(10)

No. 96-318-CFX Title: Daryll Richardson and John Walker, Petitioners
v.
Ronnie Lee McKnight

Docketed: August 30, 1996 Court: United States Court of Appeals for the Sixth Circuit

Entry	Date	Proceedings and Orders
	Aug 26 1996	Petition for writ of certiorari filed. (Response due October 25, 1996)
	Sep 24 1996	Order extending time to file response to petition until October 25, 1996.
	Oct 24 1996	Brief of respondent Ronnie Lee McKnight in opposition filed.
	Nov 6 1996	DISTRIBUTED. November 27, 1996
	Nov 27 1996	Petition GRANTED. The brief of petitioners is to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Monday, January 13, 1997. The brief of respondent is to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Wednesday, February 12, 1997. A reply brief, if any, may be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Monday, Marcch 3, 1997. Rule 29.2 does not apply. SET FOR ARGUMENT March 19, 1997. **********
	Jan 3 1997	Motion of petitioners to dispense with printing the joint appendix filed.
	Jan 13 1997	Motion of petitioners to dispense with printing the joint appendix GRANTED.
	Jan 13 1997	Brief of petitioners Daryll Richardson and John Walker filed.
	Jan 13 1997	Brief amici curiae of International City/County Management Association, et al. filed.
	Jan 31 1997	Record filed.
	Feb 7 1997	Brief amicus curiae of United States filed.
	Feb 12 1997	Brief of respondent Ronnie Lee McKnight filed.
	Feb 12 1997	Brief amicus curiae of American Federation of Government Employees, AFL-CIO filed.
	Feb 12 1997	Brief amici curiae of American Civil Liberties Union, et al. filed.
	Feb 20 1997	CIRCULATED.
	Feb 24 1997	Motion of the Acting Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument filed.
	Mar 3 1997	Motion of the Acting Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument GRANTED.
	Mar 3 1997	Reply brief of petitioners Daryll Richardson and John Walker filed.
	Mar 12 1997	Record filed.
	Mar 19 1997	ARGUED.

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Supreme Court, U.S.
FILED

96 318 AUG 26 1996

No. OFFICE OF THE CLERK

In The

Supreme Court of the United States

October Term, 1995

DARYLL RICHARDSON, and JOHN WALKER,

Petitioners,

vs.

RONNIE LEE McKNIGHT,

Respondent.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

CHARLES R. RAY
ROBERT S. CATZ
211 Third Avenue North
Nashville, TN 37201
(615) 256-2111

Counsel for Petitioners

August 26, 1996

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

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I. QUESTION PRESENTED

Are private parties performing traditional public functions as prison correctional officers under color of law on behalf of the government, police powers exclusively reserved to the sovereign as delegated to their employer, a private for profit corporation operating a correctional facility under contract as authorized by state law, entitled to assert the defense of qualified immunity as defendants in a damage action brought under 42 U.S.C. § 1983 by a prison inmate while fulfilling their statutorily defined duties of providing correctional services to convicted inmates placed in their custody and confinement by the Tennessee Department of Corrections?

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Petitioners Daryll Richardson and John Walker[1] respectfully pray that a writ of certiorari issue to review the final judgment and opinion of the United States Court of Appeals for the Sixth Circuit entered in this proceeding on July 10, 1996.

II. OPINIONS BELOW

The opinion of the United States Court of Appeals for the Sixth Circuit is reported. *McKnight v. Rees*, 88 F.3d 417 (6th Cir. 1996). (App. 1-22). The decision of the United States District Court for the Middle District of Tennessee is not reported. (App. 23-37). Both decisions are reproduced in the Appendix hereto.

III. JURISDICTION

The judgment of the United States Court of Appeals for the Sixth Circuit was entered on July 10, 1996. This petition for writ of certiorari was filed in this Court within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

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[1] Pursuant to Supreme Court Rule 29.1 petitioners disclose that they are correctional officers employed by the Correctional Corporation of America (CCA) of Nashville, Tennessee. CCA is underwriting petitioners' defense of this action. Thus, a favorable decision by the Court would end CCA's expenditure of petitioners' defense.

IV. STATUTORY PROVISIONS INVOLVED

42 U.S.C. § 1983:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.
>
> For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

"The Private Prison Contracting Act of 1986", as amended, T.C.A. § 41-24-101 et seq. is reproduced in the Appendix attached hereto at App. 50-64.

V. STATEMENT OF THE CASE

In 1986 the Tennessee legislature enacted the "Private Prison Contracting Act of 1986", T.C.A. § 41-24-101 et seq. The Act authorizes the Tennessee Commissioner of Corrections to enter into contracts for the management and operation of correctional facilities and for the provision of correctional services with private sector prison contractors to prison inmates under the custody of the Tennessee Department of Corrections. T.C.A. § 41-24-103. The preamble of the Act makes clear the experimental nature of the Act and authorizes the Tennessee Commissioner of Corrections:

> [T]o contract with private concerns on a limited basis to afford the opportunity to determine if savings and efficiencies can be effected for the operation of correctional facilities and at the same time insure that the interests of the state citizens and employees can be fully protected.

1986 Tenn. Pub.Acts ch.932. *See generally,* W.J. Cody & A. Bennett, *The Privatization of Correctional Institutions: The Tennessee Experience,* 40 VAND.L.REV. 829 (1987).

Under the Tennessee Act "correctional services" are defined broadly to include the following public functions, services and activities within the prison:

> (A) Education, training and job programs;
>
> (B) Recreation, religious and other activities;
>
> (C) Development and implementation assistance for classification, management information systems or services;
>
> (D) Food services, commissary, medical services, transportation, sanitation or other ancillary services;
>
> (E) Counseling, special treatment programs, or other programs for special needs; and
>
> (F) Operation of facilities, including management, custody of inmates, and providing security;

T.C.A. § 41-24-102.

Respondent Ronnie Lee McKnight is a state inmate in the custody of the Tennessee Department of Corrections. The Commissioner of Corrections designated that respondent be confined at the South Central Correctional Center

(SCCC), Clifton, Tennessee, a facility managed and operated under a contract entered into by the Tennessee Commissioner of Corrections and the Corrections Corporation of America (CCA). CCA is a private, for profit corporation, and its employees are private individuals who act under the authority of the Private Prison Contracting Act of 1986, T.C.A. § 41-24-101 et seq. By contract the State of Tennessee has delegated to them as employees of CCA , police powers and traditional public functions exclusively reserved to the sovereign to provide comprehensive correctional services to prisoners sentenced by the Tennessee courts in the custody and confinement of the Tennessee Commissioner of Corrections. The Act prohibits the delegation of specific powers and duties to private contractors in the areas of inmate parole, release, work release and furloughs, calculating good time credits, levels of restrictive custody and disciplinary actions. These powers are expressly reserved to the Tennessee Commissioner of Corrections. T.C.A. § 41-24-112.

On March 3, 1994 respondent McKnight filed the instant action for $400,000 in compensatory and punitive damages under 42 U.S.C. § 1983 in the United States District Court for the Middle District of Tennessee against John Rees[2], the warden of the South Central Correctional Center (SCCC) and two of its correctional officers Daryll Richardson and John Walker. *McKnight v. Rees*, No. 1-94-0042 (M.D.Tenn.) (App. 38-49) The respondent's complaint alleges that his rights to be free from cruel and

[2] Warden John Rees was subsequently dismissed from the case. Respondent McKnight did not appeal the dismissal. (App. 2) Accordingly, Warden Rees is not before the Court.

unusual punishment under the Eighth Amendment of the United States Constitution were violated when he was subjected to excessively tight restraints which caused him severe bodily injury during his transport on September 13, 1993 from the Tennessee Reception Center, Nashville, Tennessee to SCCC, Clifton, Tennessee. Respondent alleges that the restraints caused him extreme pain and swelling which resulted in his hospitalization, and that when he complained to petitioners Richardson and Walker about the restraints his pleas were deliberately ignored, and that he was taunted by them after he complained about the restraints, and that said conduct of respondents amounted to deliberate indifference of his medical needs in violation of *Estelle v. Gamble*, 429 U.S. 97 (1976); *Farmer v. Brennan*, 114 S.Ct. 1970 (1994).

On December 2, 1994 petitioners McKnight and Walker moved to dismiss the complaint asserting that as private persons acting under color of law and performing exclusive public functions as correctional officers delegated to their employer, the Corrections Corporation of America, they were entitled to the defense of qualified immunity. On March 1, 1995 the district court denied the motion to dismiss, holding that petitioners Richardson and Walker, private persons employed as agents of a private, for profit corporation were not entitled to the defense of qualified immunity. In denying the petitioners' motion to dismiss, the district court relied on its earlier decision in *Manis v. Correctional Corporation of America*, 859 F. Supp. 302 (M.D.Tenn.1994). On March 6, 1995, petitioners filed a timely interlocutory appeal to the United States Court of Appeals for the Sixth Circuit as provided under *Mitchell v. Forsyth*, 472 U.S. 511 (1995); *Johnson v. Jones*, 115 S.Ct. 2151, 2156 (1995) (App. 2). The

jurisdiction of the court of appeals was invoked under 28 U.S.C. § 1291. On July 10, 1996 the Sixth Circuit affirmed the district court's denial of the petitioners' motion to dismiss the respondent's complaint, holding that the defense of qualified immunity was unavailable to private persons acting under color of law.

This timely petition for writ of certiorari follows.

V. REASONS FOR GRANTING THE WRIT

The Sixth Circuit's Decision Below Conflicts with Applicable Decisions of the First, Seventh, Tenth and Eleventh Circuits Which Hold that Private Parties Acting Under Color of Law on Behalf of the State, Fulfilling Statutorily Authorized Functions and Duties Under Contract or Court Mandate are Entitled to the Defense of Qualified Immunity from Suit Brought Under 42 U.S.C. § 1983.

This petition raises a fundamental and important core question of federal law regarding the availability of the qualified immunity defense to private parties acting under color of law while engaged in the performance of an exclusive governmental police power function of the custodial detention of state prisoners in their capacity as private prison correctional officers at the behest of the state, an issue left unresolved by recent prior decisions of the Court. Review by the Court is necessary to resolve a clear and irreconcilable conflict with the Sixth Circuit's decision below and applicable decisions of the First,

Seventh, Tenth and Eleventh circuits on a core and fundamental question of federal law of nationwide import.[3]

In *Lugar v. Edmonston Oil Co.*, 457 U.S. 922, 942 (1982) the Court held that a private party initiating state attachment procedures later successfully challenged as unconstitutional, acts under color of state law and is liable for the deprivation of property under 42 U.S.C. § 1983. In *Lugar*, the Court declined to "reach the question of the availability of [qualified immunity] to private individuals at this juncture." *Id.* at 942 n.23.

In *Wyatt v. Cole*, 504 U.S. 158 (1992) the Court reviewed the qualified immunity issue left open in *Lugar* "whether private defendants charged with 42 U.S.C. § 1983 violations are entitled to qualified immunity from suit." *Id.* at 159. In *Wyatt* the Court noted:

> The question on which we granted certiorari is *a very narrow one*: "[W]hether private persons, who conspire with state officials to violate constitutional rights, have available to them the good faith immunity applicable to public officials." The precise issue encompassed in this question, and the *only* issue decided by the lower courts, is whether qualified immunity, . . . is available for private defendants

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[3] The Corrections Corporation of America (CCA), headquartered in Nashville, Tennessee, operates 33,000 beds under government contract in fifty facilities in the United States, Great Britain and Australia. *THE TENNESSEAN*, at p.1E (July 28, 1996). In the United States, CCA provides correctional services in the First Circuit (Puerto Rico), Fifth Circuit (Louisiana, Mississippi, Texas), Sixth Circuit (Tennessee), Tenth Circuit (Kansas, New Mexico) and the Eleventh Circuit (Florida).

> invoking a state replevin, garnishment or attachment statute.

Id. at 168. (Emphasis added)

In *Wyatt* the Court answered the question no when it held that qualified immunity is not available to defendants acting purely as private parties for personal gain invoking unconstitutional statutory seizure remedies. *Id.* 168-169. In reaching its conclusion the Court noted "that the rationales mandating qualified immunity for public officials are not applicable to private parties." *Id.* at 167. In so holding the Court noted:

> Unlike school board members, or police officers, or Presidential aides, private parties hold no office requiring them to exercise discretion; nor are they principally concerned with enhancing the public good. Accordingly extending qualified immunity to private parties would have no bearing on whether public officials are able to act forcefully and decisively in their jobs or whether qualified applicants enter public service. Moreover, unlike with government officials performing discretionary functions they will not be unduly impaired if private individuals are required to proceed to trial to resolve their legal disputes. In short, the nexus between private parties and the historic purposes of qualified immunity is simply too attentuated to justify such an extension of our doctrine of immunity.

Id. at 168. (Citations omitted)

Since this Court's decision in *Wyatt*, the First, Seventh, Tenth and Eleventh Circuits have construed this Court's holding narrowly, limiting its application to the "precise issue" that qualified immunity is not available as

a defense in cases only where private parties act under color of law in pursuit of its own narrow private interests unrelated to the performance of a governmental function. In contrast the Sixth Circuit has rejected this approach and reads *Wyatt* as creating a broad per se rule that *"private parties are not eligible for immunity from suit."* (App. 21).

Those circuits in conflict with the Sixth Circuit draw factual and policy distinctions in two category of cases when resolving whether a private defendant acting under color of law should be afforded the availability of a qualified immunity defense under 42 U.S.C. § 1983. Thus, private parties acting under color of law and fulfilling a traditional governmental function at the behest of the sovereign either under contract, agreement, grant or pursuant to a court mandated order are entitled to assert a qualified immunity defense otherwise recognized as available to public officers acting in a similar capacity. *Rodrigues v. Furtado*, 950 F.2d 805, 815 (1st Cir. 1991) (private physician who performed vaginal cavity search pursuant to valid search warrant entitled to qualified immunity); *Frazier v. Bailey*, 957 F.2d 920, 928-929 (1st Cir. 1992) (private social workers who contracted with state to provide statutorily required counseling and investigative services of child abuse are entitled to qualified immunity); *Sherman v. Four County Counseling Center*, 987 F.2d 387, 405-406 (7th Cir. 1993) (qualified immunity applies to private medical institution involved in emergency court ordered involuntary detention and treatment of plaintiff); *Leeks v. Cunningham*, 997 F.2d 1330, 1333 (11th Cir.), *cert. denied*, 114 S.Ct. 609 (1993) (private physician under contract to provide medical services to county jail entitled to

qualified immunity); *Williams v. O'Leary*, 55 F.3d 320, 323-24 (7th Cir.), *cert. denied*, 116 S.Ct. 527 (1995) (physician whose private employer held state contract to provide medical care to state prison system entitled to qualified immunity); *Warner v. Grand County*, 57 F.3d 962, 966 (10th Cir. 1995) (private crisis center director conducting strip search at police officer's request entitled to qualified immunity); *Eagon v. Elk City*, 72 F.3d 1480, 1489 (10th Cir. 1996) (private person charged with power pursuant to city council resolution to grant or deny applications for Christmas displays in city park entitled to qualified immunity).

On the other hand, private parties acting under color of law for purely private financial gain or solely for narrow self-interest as in *Wyatt*, unrelated to the performance of a traditional public function are not entitled to qualified immunity. *Burrell v. Board of Trustees of Ga. Military College*, 970 F.2d 785, 787 (11th Cir. 1992), *cert. denied*, 507 U.S. 1018 (1993) (private defendants acting in concert with public officials of military college to terminate plaintiff's employment because of husband's public criticism of institution not entitled to qualified immunity); *Howerton v. Gabica*, 708 F.2d 380, 385 n.2 (9th Cir. 1983) (private landlord who enlisted services of police officers to assist in unlawful eviction not entitled to qualified immunity); *Felix de Santana v. Velez*, 956 F.2d 16, 20 (1st Cir.), *cert. denied*, 506 U.S. 817 (1992) (private party who conspired with prosecuting attorney to indict a co-worker for perjury not entitled to qualified immunity); *Vector Research, Inc. v. Howard & Howard, Attorneys, P.C.*, 76 F.3d 692, 698-99 (6th Cir. 1996) (private attorneys assisting law

enforcement in unlawful search and seizure not entitled to qualified immunity).

In rejecting the availability of the defense of qualified immunity to petitioners Richardson and Walker, private correctional officers employed by CCA under state contract authorized by the Tennessee Commissioner of Corporations, the Sixth Circuit offered the following policy rationale which conflicts with the several circuits that have construed *Wyatt* narrowly by limiting this Court's holding only to those factual circumstances where a private person acts under color of law to promote an exclusive private interest:

> The public undoubtedly has an interest in maintaining secure and efficient correctional facilities. . . . Suffice it to say that it is beyond peradventure that correctional officers working for a private, for-profit corporation that has contracted with the state are serving a public interest by operating Tennessee's prison facilities.
>
> * * *
>
> Nonetheless, we also recognize that, while privately employed correctional officers are serving the public interest by maintaining a correctional facility, they are not motivated by a desire to further the interests of the public at large. Rather, as employees of a private corporation seeking to maximize profits, correctional officers act, at least in part, out of a desire to maintain the profitability of the corporation for whom they labor, thereby insuring their own job security. While this arguably did not vitiate furtherance of the public interest, it upsets the balance qualified immunity seeks to establish "between compensating those who have been

> injured by official conduct and protecting government's ability to perform its traditional public functions." *Wyatt*, 504 U.S. at 167. The balance struck by qualified immunity, at least implicitly contemplates a government actor acting for the good of the state, not a private actor for the good of the pocketbook.

(App. 15-16)

The Sixth Circuit's decision, admittedly relies on an "implicitly" broad reading of *Wyatt* which is unreasonable and is clearly in conflict with applicable decisions of the First, Seventh, Tenth and Eleventh Circuits which have considered the precise question presented herein. Circuit Judge Nelson, in his separate opinion concurring in the judgment, noted that he was constrained by binding Sixth Circuit precedent from holding that petitioners were entitled to qualified immunity, which has adopted a per se rule *"that private parties are not eligible for immunity from suit."* (App. 21) (Emphasis in text) *Duncan v. Peck*, 844 F.2d 1261, 1264 (6th Cir. 1988); *Vector Research, Inc. v. Howard & Howard, P.C.*, 76 F.3d 692, 698-99 (6th Cir. 1996):

> If I believed that we were free to dispose of this appeal on public policy grounds, my vote would be to remand the case with instructions to dismiss. . . . The notion that there is likely to be a meaningful difference between the behavior of a correctional officer whose paycheck comes from the State of Tennessee and the behavior of a correctional officer whose paycheck comes from the Corrections Corporation of America is a notion, it seems to me, that bespeaks a vaguely utopian view of the virtues of those that feed at the public trough. This view is not one I share. If it is sound public policy to

> offer qualified immunity from suit to correctional officer employed by a public corporation, I think it is equally sound policy to offer qualified immunity to the officer employed by a private corporation, assuming both employees perform identical public functions. . . . In the post-*Wyatt* era, I imagine, most of our sister circuits will probably continue to make qualified immunity available to private defendants who perform governmental functions for governmental purpose. . . . Given *Duncan*, however, I do not believe the qualified immunity option is currently open to our panel. . . . *This holding may be too broad*, but our circuit precedent rule makes it binding on us here.

(App. 20-22) (Emphasis added)

In *Procurrier v. Naverette*, 434 U.S. 555, 561-562 (1978) the Court held that state correctional officers are entitled to qualified immunity. The policy rationale offered by the Sixth Circuit in rejecting qualified immunity for private correctional officers is totally inconsistent with the Court's longstanding functional approach in determining the application of qualified immunity. *West v. Atkins*, 487 U.S. 42, 55-56 (1988) (employees function within the state system, not the precise terms of employment, determines whether actions of the defendant can be fairly attributed to the state); *Forrester v. White*, 484 U.S. 219, 227 (1988) (immunity justified by the functions it protects and serves, not by the person to whom it attaches); *Cleavinger v. Saxner*, 474 U.S. 193, 201 (1985) (immunity flows not from rank or title or location within the government, but from the nature of the responsibilities of the individual involved); *Briscoe v. LaHue*, 460 U.S. 325, 342 (1983) (immunity analysis rests on functional categories not on

the status of the defendant); *Butz v. Economou*, 438 U.S. 478, 503 (1978) (administrative hearing examiner is functional equivalent to a judge).

The functional analysis approach employed by the Court when applied to the facts of this case inescapably ordains for the extension of the qualified immunity defense to private correctional guards performing unique police powers of incarceration of convicted felons under state custody exclusively reserved to the sovereign. *Rendall-Baker v. Kohn*, 457 U.S. 830, 842 (1982) (the relevant question is not whether a private group is serving a "public function" but whether the function performed has been "the *exclusive* prerogative of the state"). *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345, 352-353 (1974). The traditional and exclusive public function delegated by the State of Tennessee, privatizing correctional services under the Private Prison Contracting Act of 1986, T.C.A. § 41-24-101, et seq., by contract to CCA and in turn to its private correctional officers similarly should turn on an analysis tailored to the scope and nature of the function performed by petitioners and not whether one holds the status of government employee as opposed to private contract employee when both functions are conducted under color of law for the benefit of the public interest.

This case presents the Court with an opportunity to clarify whether private correctional officers acting under color of law in the performance of exclusive public functions delegated to them under state law and contract which require them to undertake the same discretionary acts for the public benefit as provided by state employed correctional officers should be entitled to the defense of

qualified immunity. Petitioners perform the same discretionary functions in their daily interactions with violent criminal offenders, and are called upon to make the same decisions for the benefit of the public interest as state correctional officers working at prisons operated by the state. There is no allegation in this case that petitioners conspired with government officials for private gain or self-interest to act beyond the boundaries of the law or the scope of their duties, which permits but does not require them to act in a certain manner. *Dennis v. Sparks*, 449 U.S. 24, 25 (1978) (action under § 1983 available against private co-conspirators of state trial judge that alleged to have corruptly issued an injunction even though judge has absolute immunity). The denial of qualified immunity to private correctional officers employed by CCA under state contract would implicate an unsound policy of placing form over substance. Neither is there anything in *Wyatt* that suggests that the Court intended to abandon its longstanding functional analysis approach in immunity cases, nor does it appear that the Court remotely intended to establish a per se bright line rule implicated by the Sixth Circuit's decision herein that private persons acting under color of law may never be shielded by qualified immunity. To the contrary, after the *Wyatt* decision the Court noted in *Antoine v. Byers & Anderson, Inc.*, 598 U.S. 429, 432 n.3 (1993) (rejecting claim of absolute immunity for private court reporters as the performance of their public duties are purely ministerial, involving no acts of discretion) that the Second, Fifth and

Eighth circuits hold that private court reporters that provide stenographic services to trial courts are entitled to qualified immunity.[4]

In sum, the South Central Correctional Center is a prison facility owned and managed by the Corrections Corporation of America under color of law, providing correctional services under state contract as authorized by Tennessee law as an innovative *experimental* program, whose performance standards and qualitative operations are pervasively regulated and supervised by the Tennessee Commissioner of Corrections, the Tennessee Attorney General, and both houses of the Tennessee legislature under T.C.A. § 41-24-104. *Garcia v. San Antonio Metro. Authority*, 469 U.S. 528, 543-46 (1985) (concluding that the distinction between "traditional" governmental functions and proprietary functions was both unworkable in practice and unsound in principle, since it is inconsistent with federalism's basic tenet that states should be free to *experiment* with "any activity that their citizens choose for the common weal"). (Emphasis added)

These petitioners, in their capacity as correctional officers employed by CCA and acting under color of law, perform exclusive discretionary police powers and functions delegated to them by the State of Tennessee identical to state employed correctional officers. It is the public interest, not the narrow personal interests of the petitioners that warrants the granting of qualified immunity

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[4] *See, Green v. Maraio*, 722 F.2d 1013, 1018 (2d Cir. 1982); *Slavin v. Curry*, 574 F.2d 1256, 1265-1266 (5th Cir. 1978); *McLallen v. Henderson*, 492 F.2d 1290, 1299-1300 (8th Cir. 1974).

to them. The policy concerns that litigation costs substantial sums of money and diverts public servants' energy from their public responsibilities and duties, and that the threat of liability deters those considering public service will "dampen the ardor of all but the most resolute, or the most responsible public officials, in the unflinching discharge of their duties," applies to the functions performed by CCA's correctional officers. *Harlow v. Fitzgerald*, 457 U.S. 800, 814 (1982). Litigation against these petitioners carries the same social costs as those faced by state officers and will divert their energies from their duties as their state counterparts. CCA did not contract to provide correction services for the State for benevolent reasons. Any costs of litigation will ultimately be passed on to the State. The specter or threat of litigation will also deter those who might otherwise seek employment opportunities with CCA, and by CCA itself when it considers contracting their services with a governmental agency. There is no reason to believe that the threat of personal liability suits brought under 42 U.S.C. § 1983 would have any less "dampening" effect on CCA correctional officers in the discharge of their discretionary duties than it would have on state correctional officers.

SCCC is a prison owned, managed and operated by CCA on behalf of the State, and the public has a significant interest in having those individuals that serve in these facilities do so free of the threat of unnecessary litigation. It furthers the public interest that qualified private contractors such as CCA and these petitioners not be discouraged from performing their important governmental discretionary functions by working at SCCC due to the ever present threat of personal liability. In addition,

if the Sixth Circuit decision is permitted to stand, it could affect the willingness of the several states, its political sub-divisions and the federal government to engage private contractors in the joint development of cooperative experimental programs in furtherance of the public good. This is particularly so as the society enters a period of government downsizing and expanded reliance on the private sector to perform a variety of traditional public functions. Contrary to the Sixth Circuit's decision herein, granting of qualified immunity as an available defense to the petitioners appropriately strikes a fair and proper balance between the strong societal interest of compensating individuals for unconstitutional deprivations while at the same time insuring that private persons will not be deterred from the performance of valuable and important governmental functions.

VII. CONCLUSION

For the foregoing reasons, a writ of certiorari should issue to review the judgment and opinion of the United States Court of Appeals for the Sixth Circuit.

Respectfully submitted,

CHARLES R. RAY
ROBERT S. CATZ
211 Third Avenue North
Nashville, TN 37201
(615) 256-2111

Counsel for Petitioners

August 26, 1996

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*RECOMMENDED FOR FULL-TEXT PUBLICATION**
Pursuant to Sixth Circuit Rule 24

ELECTRONIC CITATION: 1996 FED App. 0205P (6th Cir.)
File Name: 96a0205p.06

No. 95-5398

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

RONNIE LEE MCKNIGHT, *Plaintff-Appellee,*	)	
v.	)	ON APPEAL from the United States District Court for the Middle District of Tennessee
JOHN REES, *Defendant,*	)	
DARYLL RICHARDSON and JOHN WALKER, *Defendants-Appellants.*	)	

Decided and Filed July 10, 1996

Before: KEITH, MARTIN, and NELSON, Circuit Judges.

MARTIN, J., delivered the opinion of the court, in which KEITH, J., joined. NELSON, J. (pp. 17-19), delivered a separate opinion concurring in the judgment.

BOYCE F. MARTIN, JR., Circuit Judge. Tennessee contracts with private corporations to operate its prison facilities. In their capacities as correctional officers, defendants Daryll Richardson and John Walker allegedly

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* Reported at 88 F.3d 417 (6th Cir. 1966).

violated plaintiff Ronnie McKnight's Eighth Amendment right to be free from cruel and unusual punishment. Richardson and Walker now pursue this interlocutory appeal from the district court's denial of their motion to dismiss McKnight's section 1983 action.[1] Richardson and Walker argue that they are entitled to qualified immunity from suit, and that the district court erred in concluding otherwise. For the reasons set forth below, we AFFIRM.

McKnight filed this action under 42 U.S.C. § 1983 on March 3, 1994, against John Rees, the warden of the Corrections Corporation of America's South Central Correctional Center, and correctional officers Richardson and Walker.[2] Rees was subsequently dismissed from the suit, and his dismissal is not before this Court.

In his complaint, McKnight alleged that these officers violated his constitutional rights under the Eighth Amendment by subjecting him to tight restraints during

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[1] We have jurisdiction to hear this interlocutory appeal pursuant to the Supreme Court's decision in *Mitchell v. Forsyth*, 472 U.S. 511, 528-30 (1985). We pause only to note that the Court's recent decision in *Johnson v. Jones*, 115 S.Ct. 2151, 2156 (1995), does not alter our authority to hear an appeal from the denial of qualified immunity in cases in which the district court's decision rests on a legal conclusion. *Mitchell*, 472 U.S. at 530. *Johnson* held only that we do not have interlocutory jurisdiction to review a denial of qualified immunity when the district court bases its decision on the ground that a genuine issue of material fact exists. *Johnson*, 115 S.Ct. at 2156; *Blair v. Meade* 76 F.3d 97, 100 n. 2 (6th Cir. 1996). Where, as here, the district court bases its decision on a legal conclusion, our interlocutory jurisdiction remains intact.

[2] Corrections Corporation of America is a private, for-profit corporation that has contracted with the State of Tennessee to maintain some of its correctional facilities.

his transport to another prison. He claims that the restraints caused him serious medical injury which actually required hospitalization. Finally, the complaint states that McKnight's protestations were ignored, and that Richardson and Walker taunted him after he complained about the restraints.

Richardson and Walker moved to dismiss the complaint, asserting that they were entitled to qualified immunity pursuant to their job function as correctional officers. The district court denied the motion to dismiss, holding that Richardson and Walker, as employees of a private, for-profit corporation, were not entitled to the defense of qualified immunity. This timely interlocutory appeal followed.

Section 1983 provides a cause of action against any person who, under color of state law, deprives an individual of any right, privilege, or immunity secured by the Constitution and federal law.[3] 42 U.S.C. § 1983. "The purpose of § 1983 is to deter state actors from using the badge of their authority to deprive individuals of their federally guaranteed rights and to provide relief to victims if such deterrence fails." *Wyatt v. Cole*, 504 U.S. 158,

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[3] Richardson and Walker do not dispute that they were acting under color of state law for the purposes of section 1983 liability, even though each are privately employed by Corrections Corporation of America. Under the test set forth by the Supreme Court in *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 937 (1982), it appears that these defendants can be liable under section 1983, and are acting "under color of state law." *See Jordan v. Fox, Rothschild, O'Brien & Frankel*, 20 F.3d 1250, 1264-67 (3d Cir. 1994) (discussing the *Lugar* test in depth). Nonetheless, we simply assume without deciding this fact for the purposes of this appeal.

161 (1992) (citation omitted). The Supreme Court has repeatedly recognized that "[w]hen government officials abuse their offices, 'action[s] for damages may offer the only realistic avenue for vindication of constitutional guarantees.' " *Anderson v. Creighton*, 483 U.S. 635, 638 (1987) (quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 814 (1982)). Balanced against this concern is the equally important need to ensure that the threat of personal liability does not inhibit public officials from vigorously performing their duties as representatives of the public interest. *Id.* We are asked here whether accommodation of these competing interests warrants the extension of qualified immunity to corrections officers employed by a private corporation under contract with the State of Tennessee.

We begin by noting that *state employed* correctional officers do enjoy the protections of qualified immunity in carrying out their duties. *Procunier v. Navarette*, 434 U.S. 555, 561-62 (1978); *Williams v. Bass*, 63 F.3d 483, 486 (6th Cir. 1995). It is not immediately apparent, however, whether *private* correctional officers, performing by contract functions admittedly similar to those traditionally within the governmental sphere, should or should not be granted similar immunity. The principles undergirding qualified immunity do not necessarily apply with equal force when a private actor seeks its invocation.

In *Duncan v. Peck*, 844 F.2d 1261 (6th Cir. 1988), this Court held that qualified immunity does not protect from subsequent liability private individuals who resort to state garnishment or prejudgment attachment procedures in pursuit of personal interests. *Id.* at 1264-66. In so holding, we examined the scope of the immunity doctrine

developed by the Supreme Court, initially pointing out that "section 1983 allows no immunities on its face." *Id.* at 1263; *See also Imbler v. Pachtman*, 424 U.S. 409, 417 (1976). However, we also recognized that the Supreme Court has afforded governmental officials one form of immunity or another in a variety of situations. *Duncan*, 844 F.2d at 1263. Thoroughly examining the common law history of immunity for private individuals and the policy rationales traditionally used to justify immunity, we concluded that neither supported the grant of qualified immunity to the private actors in that case. *Id.* at 1264. The Supreme Court has embraced this position as well. *Wyatt*, 504 U.S. at 168-69 (holding that private parties invoking state garnishment or prejudgment attachment statutes later found to be unconstitutional are not entitled to qualified immunity). We have recently reaffirmed this approach in a *Bivens* action. *Vector Research, Inc. v. Howard & Howard Attorneys P.C.*, 76 F.3d 692, 698-99 (6th Cir. 1996) (holding that private attorneys who assisted federal agents in a search and seizure pursuant to an ex parte order could be liable for constitutional violations arising out of their conduct). Nonetheless, neither *Vector Research, Duncan* nor the Supreme Court's decision in Wyatt necessarily forecloses the application of qualified immunity here because each of those cases relied in part on the fact that the policy rationales that support qualified immunity did not apply on the facts. Further inquiry is needed, and we must examine the public policy underpinnings of qualified immunity to determine whether these defendants should be allowed to utilitize its protections.

When determining whether a private individual may claim qualified immunity as a defense to a section 1983 claim, the Supreme Court's decision in Wyatt teaches that we must look first to determine whether the "tradition of immunity [is] . . . firmly rooted in the common law." Wyatt, 504 U.S. at 164 (quoting *Owen v. City of Independence*, 445 U.S. 622, 637 (1980)). However, we also note that the Supreme Court's decision in *Harlow v. Fitzgerald*, "completely reformulated qualified immunity along principles not at all embodied in the common law." *Anderson*, 483 U.S. at 645 (citing *Harlow*, 457 U.S. at 815-20. Therefore, although we have already recognized that there is "no evidence that the common law ever extended [qualified] immunity to include private citizens," *Duncan*, 844 F.2d at 1264, we conclude that, when determining whether qualified immunity is appropriate, the traditions of common law immunity inform our analysis but the presence or absence of immunity found there is not necessarily dispositive.

In addition to examining the historical roots of immunity, we also determine whether strong public policy reasons support the recognition of qualified immunity in particular cases. *Wyatt*, 504 U.S. at 164-66; *Duncan*, 844 F.2d at 1263-64 (relying on *City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 258-59 (1981)). At this juncture of the analysis, we are informed by the Supreme Court's explanation that we must "examine the nature of the functions with which a particular official or class of officials has been lawfully entrusted" to determine whether we should recognize qualified immunity in a given case. *Forrester v. White*, 484 U.S. 219, 224 (1988). Finally, when determining whether public policy supports the grant or

denial of immunity, "[w]e do not have a license to establish immunities from [section] 1983 actions in the interests of what we judge to be sound public policy." *Tower v. Glover*, 467 U.S. 914, 922-23 (1984). We turn now to a perusal of the various rationales utilized to support qualified immunity.

While discussing the rationale underlying the creation of immunity from suit in *Forrester v. White*, the Court explained that:

> Suits for monetary damages are meant to compensate the victims of wrongful actions and to discourage conduct that may result in liability. Special problems arise, however, when government officials are exposed to liability for damages. To the extent that the threat of liability encourages these officials to carry out their duties in a lawful and appropriate manner, and to pay their victims when they do not, it accomplishes exactly what it should. By its nature, however, the threat of liability can create perverse incentives that operate to inhibit officials in the proper performance of their duties. In many contexts, government officials are expected to make decisions that are impartial or imaginative, and that above all are informed by considerations other than the personal interests of the decisionmaker. . . . When officials are threatened with personal liability for acts taken pursuant to their official duties, they may well be induced to act with an excess of caution or otherwise to skew their decisions in ways that result in less than full fidelity to the objective and independent criteria that ought to guide their conduct.

484 U.S. at 223. Emphasizing that courts should adopt a "functional" approach to questions of immunity, the *Forrester* Court characterized the inquiry as one in which courts should "seek to evaluate the effect that exposure to particular forms of liability would likely have on the appropriate exercise of [the relevant government] functions." *Id.* at 224.

In *Wyatt*, the Supreme Court held that private defendants may not invoke the protections of qualified immunity when charged with section 1983 liability after utilizing state replevin, garnishment, and attachment statutes later held to be unconstitutional. 504 U.S. at 168-69. The Court explained that the rationales advanced in support of qualified immunity for government actors are "not transferable to private parties." *Id.* at 168. The Court further elaborated:

> [W]e have recognized qualified immunity for government officials where it was necessary to preserve their ability to serve the public good or to ensure that talented candidates were not deterred by the threat of damages suits from entering public service. . . .
>
> [P]rivate parties hold no office requiring them to exercise discretion; nor are they principally concerned with enhancing the public good. Accordingly, extending Harlow qualified immunity to private parties would have no bearing on whether public officials are able to act forcefully and decisively in their jobs or on whether qualified applicants enter public service. Moreover, unlike with government officials performing discretionary functions, the public interest will not be unduly impaired if private individuals are required to proceed to trial to

> resolve their legal disputes. In short, the nexus between private parties and the historic purposes of qualified immunity is simply too attenuated to justify such an extension of our doctrine of immunity.

Id. at 167-68 (citations omitted). The broad language used by the Court in this passage might lead one to believe that qualified immunity simply is not available to private party defendants, regardless of the nature of the act for which they are sued. However, the Court expressly limited its holding to the "precise issue" of whether qualified immunity is available to private defendants faced with section 1983 liability after utilizing a state replevin, garnishment or attachment statute. *Id.* at 168-69.

Accordingly, several circuits read Wyatt narrowly, as applying only to cases in which a private party invokes state law to pursue a private interest. *See Eagon v. Elk City*, 72 F.3d 1480, 1489 (10th Cir. 1996) (discussing cases); *Burrell v. Board of Trustees of Ga. Military College*, 970 F.2d 785, 794-95 (11th Cir. 1992), *cert. denied*, 507 U.S. 1018 (1993) (same). These circuits contrast two lines of cases in determining whether a private party should be granted qualified immunity under section 1983. In those cases rejecting a qualified immunity defense and falling within the scope of the Supreme Court's decision in Wyatt, private parties "invoked state law in pursuit of private ends," *Warner v. Grand County*, 57 F.3d 962, 966 (10th Cir. 1995), which is precisely the situation this Court confronted in *Duncan*. *See, e.g., Burrell*, 970 F.2d at 796 (denying qualified immunity to private defendants who allegedly conspired with public officials for the sole purpose of depriving plaintiff of constitutional rights); *see*

also Howerton v. Gabica, 708 F.2d 380, 385 n. 10 (9th Cir. 1983) (denying qualified immunity to a landlord who enlisted the services of a police officer and conducted an allegedly unconstitutional eviction of tenant). However, where private defendants are fulfilling government contracts or following court orders, several circuits have held that the umbrella of qualified immunity protects the private actors. *Warner*, 57 F.3d at 965-66 (qualified immunity extended to private crisis center director conducting strip search at the request of police officers); *Sherman v. Four County Counseling Ctr.*, 987 F.2d 397, 405-06 (7th Cir. 1993) (qualified immunity for private psychiatric center for involuntary detention of allegedly mentally ill patient at the request of arresting officer); *Frazier v. Bailey*, 957 F.2d 920, 928 (1st Cir. 1992) (qualified immunity for social workers under contract with the state to provide investigation of child abuse claims). In *Warner and Sherman*, the Tenth and Seventh Circuits each held that *Wyatt* did not foreclose qualified immunity for private individuals who, at the request of a state officer, perform the duties allegedly giving rise to the section 1983 claim. *Warner*, 57 F.3d at 967; *Sherman*, 987 F.2d at 405-06.

In *Sherman*, the plaintiff had been involuntarily detained and given anti-psychotic medication pursuant to court order at the Four County Counseling Center. *Sherman*, 987 F.2d at 398-99. After his release from the center, Sherman sued pursuant to section 1983 the officer who arrested him and applied for the psychiatric evaluation, the state judge who assigned him for evaluation, the attorney who represented him at his preliminary hearing, Cass County, and Four County Counseling Center. On appeal, the Seventh Circuit considered whether Four

County was entitled to qualified immunity for its actions. Answering the question in the affirmative, the court noted that Four County had accepted and administered care to Sherman under the state judge's emergency detention order, and had complied with procedures set forth by Indiana statutory law during Sherman's involuntary detention. *Id.* at 405. These facts, according to the court, warranted the extension of qualified immunity to Four County:

> The policy justifications which underlie the doctrine of qualified immunity for government officials apply with full force to Four County's activities here. Although it is a private hospital, Four County accepted and cared for a state mental patient committed on an emergency basis. . . . If the actions it took pursuant to court order subject it to suit, private hospitals might well refuse to accept involuntary patients. This refusal would increase the load on the strained resources of the state's public hospitals. . . . [O]ne purpose of qualified immunity is to avoid discouraging public service. Denying qualified immunity to private hospitals in this situation would do just that.

Id. at 405-06 (citations omitted).

The Seventh Circuit recently reaffirmed the *Sherman* holding in a case factually analogous to the case at bar. In *Williams v. O'Leary*, the court held that medical director and staff physician of the Stateville Correctional Center in Illinois were entitled to qualified immunity even though each was an employee of Correctional Medical Systems, a private company contracting with the state to provide medical services at state correctional facilities. 55

F.3d 320, 323-24 (7th Cir.), *cert. denied*, 116 S.Ct. 527 (1995). After reviewing the two lines of cases discussed *supra*, the *Williams* court held that "[t]he instant case clearly falls within the class of cases in which qualified immunity may be raised by a private defendant." *Id.* at 324. The court believed that the fact that the defendant was "performing duties that would otherwise have to be performed by a public official who would clearly have qualified immunity" weighed in favor of granting qualified immunity to the private defendant. *Id.* (quoting *Frazier*, 957 F.2d at 928).

In *Eagon v. Elk City*, the Tenth Circuit recently reaffirmed its rule that "a private individual who performs a government function pursuant to a state order or request is entitled to qualified immunity if a state official would have been entitled to such immunity had he performed the function himself." 72 F.3d at 1489 (quoting *Warner*, 57 F.3d at 967). One of the defendants in Eagon was a private party in charge of granting or denying applications for Christmas displays in a city park in Elk City, Oklahoma pursuant to a city council resolution. The lawsuit arose out of the denial of an application for a Christmas display. On appeal, the court addressed whether the private party defendant was entitled to assert a qualified immunity defense for her actions. Ultimately, the Tenth Circuit believed that qualified immunity protected the private defendant's actions, concluding that the defendant "was performing a government function pursuant to a government request," and therefore was entitled to qualified immunity for her actions. *Id.* at 1490.

Turning to the precise question presented in this case, we note that this is a case of first impression in this circuit, and that no other circuit has addressed whether correctional officers employed by a private corporation under contract with the state are entitled to qualified immunity. Federal district courts are in conflict on the issue. *See Citrano v. Allen Correctional Ctr.*, 891 F. Supp. 312 (W.D.La.1995) (extending qualified immunity to private correctional officers); *Smith v. United States*, 850 F. Supp. 984 (M.D.Fla.1994) (same). *But see Manis v. Corrections Corp. of America*, 859 F. Supp. 302 (M.D.Tenn.1994) (refusing to grant qualified immunity to correctional officers employed by private corrections corporation). Some of these courts utilized a functional approach to conclude that correctional officers employed by private corporations under contract with the state are entitled to qualified immunity. *E.g., Citrano*, 891 F. Supp. at 316-17. At least one has concluded that the public policy underpinnings of qualified immunity do not support extending its protections to private correctional officers. *Manis*, 859 F. Supp. at 305.

Broadly stated, the Supreme Court has "followed a 'functional' approach to immunity law." *Cleavinger v. Saxner*, 474 U.S. 193, 201 (1985) (quoting *Harlow*, 457 U.S. at 810; *Briscoe v. LaHue*, 460 U.S. 325, 342 (1983) (stating that "our cases clearly indicate that immunity analysis rests on functional categories" rather than "on the status of the defendant"). Relying on this fact, some circuits emphasize the function performed by the private party in determining whether to extend qualified immunity to the private defendant. For example, the First Circuit has held that "private parties under contract to perform statutorily

mandated governmental duties are entitled to qualified immunity as functionally government employees." *Frazier*, 957 F.2d at 928; *see also Williams*, 55 F.3d at 323 (stating that qualified immunity extends to "a private party acting under a government contract fulfilling a governmental function; parties fulfilling statutorily mandated duties under a contract; and a physician acting pursuant to a court order") (quoting *Sherman*, 987 F.2d at 405). While we do not disagree that we must examine the function or nature of the conduct at issue as an initial matter, we do not believe the analysis begins and ends with asking the question whether the private party is performing a government function. We must also examine whether the "special policy concerns involved in suing government officials," *Wyatt*, 504 U.S. at 167, also support the grant of qualified immunity to private actors performing what are traditionally governmental functions, as is the case here. *See Vector Research, Inc.*, 76 F.3d at 698-99. Therefore, we next discuss whether the public policy underpinnings of qualified immunity support extending its protections to the private defendants here, guided in our analysis by the informed opinions of our sister circuits discussed above, and the Supreme Court's pronouncements on the issue.

Very generally, "qualified immunity strikes a balance between compensating those who have been injured by official conduct and protecting government's ability to perform its traditional functions." *Wyatt*, 504 U.S. at 167 (citing *Harlow*, 457 U.S. at 819). At its core, the protection "acts to safeguard government, and thereby to protect the public at large, not to benefit its agents." *Id.* at 168. Immunity seeks "to ensure that talented candidates [are]

not deterred by the threat of damage suits from entering public service." *Id.* at 167; *Harlow*, 457 U.S. at 816 (stating that immunity serves to prevent the "distraction of officials from their governmental duties, inhibition of discretionary action, and deterrence of able people from public service").

The public undoubtedly has an interest in maintaining secure and efficient correctional facilities. We need not recite the litany of public benefits traditionally associated with maintaining an effective penal system here. We pause only to note that contracting out that function may save money for the state's coffers, in addition to the traditional safety, deterrence, retribution, and symbolic rationales trotted out at every round table argument over criminal punishment. Suffice it to say that it is beyond peradventure that correctional officers working for a private, for-profit corporation that has contracted with the state are serving a public interest by operating Tennessee's prison facilities.

Nonetheless, we also recognize that, while privately employed correctional officers are serving the public interest by maintaining a correctional facility, they are not principally motivated by a desire to further the interests of the public at large. Rather, as employees of a private corporation seeking to maximize profits, correctional officers act, at least in part, out of a desire to maintain the profitability of the corporation for whom they labor, thereby ensuring their own job security.[4] While this

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[4] We do not seek by implication to question the actions or intent of these defendants. Rather, we are simply pointing out

arguably does not vitiate furtherance of the public interest, it upsets the balance qualified immunity seeks to establish "between compensating those who have been injured by official conduct and protecting government's ability to perform its traditional functions." *Wyatt*, 504 U.S. at 167 (citation omitted). The balance struck by qualified immunity, at least implicitly, contemplates a government actor acting for the good of the state, not a private actor acting for the good of the pocketbook. With respect to cutting corners on constitutional guarantees, one commentator has explained that "[e]ntrepreneurial jailers benefit directly, in the form of increased profits, from every dime not spent." Note, *The Panopticon Revisited: The Problem of Monitoring Private Prisons*, 96 Yale L.J. 353, 357 (1986).

We believe this increased threat of injury by violation of constitutional guarantees counsels against granting qualified immunity to correctional officers employed by a private corporation to run a state's prison facilities. Because private corporations operating correctional facilities are not "principally concerned with enhancing the public good," *Wyatt*, 504 U.S. at 168, the appropriate balance between the vindication of constitutional guarantees and the furtherance of the public interest cannot be struck by a liability rule which assumes as its starting point a public employee acting primarily for the benefit

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that for-profit corporations – and indirectly the employees of those corporations – seek to realize what the name implies, a profit. Accordingly, private corporations running correctional facilities have a greater incentive to cut costs by infringing upon the constitutional rights of prisoners in order to ensure the profitability of the enterprise.

of the public. To maintain this balance, the liability rule must adjust, and we believe the rule falls somewhere short of qualified immunity for these privately employed officers.

To be sure, our refusal to grant qualified immunity to private corrections officers will result in increased litigation costs, which may ultimately be passed on to the state in form of an increased contract price. However, the public interest in minimizing the costs of maintaining efficient, workable prison systems is not necessarily at odds with this result. This increased litigation cost may be offset, at least partially, by the reduced administrative costs associated with monitoring the private correctional facilities to ensure compliance with constitutional rights. To the extent that private enforcement through section 1983 acts as an effective monitor of private correctional corporations, states will realize reduced administrative monitoring costs because the threat of liability (and therefore reduced profits) will force the private actor to internalize the monitoring costs otherwise borne by the state. In short, the state may pay more to obtain private correctional services, but less to monitor them on an ongoing basis.

Further, the denial of qualified immunity here will not deter talented candidates from entering public service, another of the major concerns undergirding qualified immunity doctrine. *See e.g., Wood v. Strickland*, 420 U.S. 308, 320 (1975) (stating that the "most capable candidates for school board positions might be deterred from seeking office if heavy burdens upon their private resources from monetary liability were a likely prospect during their tenure"). We make two comments on this

issue. First, the simple fact is that correctional officers, privately employed by a corporation contracting with the state, are not in "public" service, although they are performing a service that undoubtedly benefits the public interest. The motivations for entering the field undeniably differ from those prompting, for example, a run for public office, which rarely is undertaken for financial reasons. Rather, the spur in the flank of private correctional corporations is, of course, the profitability of the enterprise. The denial of qualified immunity will not deter qualified firms from contracting with the state to manage correctional facilities. Instead, firms simply will take account of this fact when analyzing the corporate balance sheet, and contract with the state accordingly. As long as a profit can be realized from the venture, we have no fear that denying qualified immunity to these defendants will result in a dearth of qualified applicants seeking entry into the field.

In sum, we disagree somewhat with the approach taken by several other circuits, which simply asks whether the private actor is performing a traditional governmental function (often, as is the case here, because the state has decided to "privatize" that function by contracting it out), and if so, extends immunity's protective cloak to cover the private actors. As we only recently explained, "the rationale for granting qualified immunity to public officials – that they [will] act decisively in their jobs for the public good without fear of being sued – [does] not apply with equal force to private parties acting for their own ends." *Vector Research*, 76 F.3d at 699 (citation omitted). Under our analysis, we would perhaps reach a similar result via a slightly different route if

confronted with facts similar to some of the cases from our sister circuits discussed above. However, in the case before us, we believe the public policy underpinnings of qualified immunity – which strike a balance between compensation for constitutional injury and the public interest in effective government – do not apply with equal force to acts undertaken by employees of a private, for-profit corporation. We therefore refuse to grant qualified immunity to correctional officers employed by a private corporation to maintain prison facilities for the state.

It may be that the appropriate balance to be struck here is to permit the correctional officers to assert a good faith defense, rather than qualified immunity. *See Vector Research*, 76 F.3d at 699 (allowing attorneys to assert a good faith defense to Bivens claim); *Jordan v. Fox, Rothschild, O'Brien & Frankel*, 20 F.3d 1250, 1276-77 (3d Cir. 1994) (allowing good faith defense to section 1983 claim); *Duncan*, 844 F.2d at 1267-68 (same). However, that issue is not before this Court in this interlocutory appeal. We leave that issue for another day, hold only that correctional officers employed by private, for profit corporations in contract with the state are not entitled to qualified immunity.

The judgment of the district court is AFFIRMED.

DAVID A. NELSON, Circuit Judge, concurring in the judgment.

If I believed that we were free to dispose of this appeal on public policy grounds, my vote would be to remand the case with instructions to dismiss it should the district court conclude that the conduct of the defendant

correctional officers could reasonably have been thought consistent with the constitutional rights the officers are alleged to have violated. The notion that there is likely to be a meaningful difference between the behavior of a correctional officer whose paycheck comes from the State of Tennessee and the behavior of a correctional officer whose paycheck comes from the Corrections Corporation of America is a notion, it seems to me, that bespeaks a vaguely utopian view of the virtues of those who feed at the public trough. This view is not one I share. If it is sound public policy to offer qualified immunity from suit to the correctional officer employed by a public corporation, I think it is equally sound policy to offer qualified immunity to the officer employed by a private corporation, assuming both employees perform identical functions for identical reasons.

As a matter of circuit precedent, however, I believe that this panel is foreclosed from following the course to which my own view of public policy might point. In *Duncan v. Peck*, 844 F.2d 1261 (6th Cir. 1988), as the Supreme Court has recognized, "[t]he Sixth Circuit . . . rejected qualified immunity for private defendants sued under § 1983 but . . . established a good faith defense." *Wyatt v. Cole*, 504 U.S. 158, 161 (1992).

In rejecting qualified immunity for private parties, the *Duncan* panel applied a two-part test:

> "The first part requires the party claiming immunity to show that the immunity was recognized at common law. The second part requires a showing of strong public policy reasons for granting such an immunity." *Duncan*, 844 F.2d at 1264 (footnote omitted).

The holding of *Duncan* was stated by the panel as follows:

> "Because we find no evidence that private parties were immune from suit at common law, and because the various rationales for good faith immunity are inapplicable to private parties, *we hold that private parties are not eligible for immunity from suit.*" *Id.* (Emphasis supplied.)

This holding may be too broad, but I believe that our circuit precedent rule makes it binding on us here. It is true that where public officials are concerned, the Supreme Court has disclaimed any "suggest[ion] that the precise contours of official immunity can and should be slavishly derived from the often arcane rules of the common law." *Anderson v. Creighton*, 483 U.S. 635, 645 (1987). As *Anderson* went on to say, "[t]hat notion is plainly contradicted by *Harlow [v. Fitzgerald*, 457 U.S. 800 (1982)], where the Court completely reformulated qualified immunity along principles not at all embodied in the common law. . . . " *Id.* But the Supreme Court decided *Anderson* well before this court decided *Duncan*, so Anderson does not relieve us of the obligation to follow *Duncan*. And the two decisions are not inconsistent in any event, *Duncan* having involved private parties and Anderson having involved an agent of the Federal Bureau of Investigation.

Neither, of course, does the Supreme Court's subsequent decision in *Wyatt* relieve us of the obligation to follow *Duncan*. The *Wyatt* Court pointed out that the Sixth Circuit's blanket rejection of qualified immunity for private defendants conflicts with other circuits' recognition of such immunity under certain circumstances, but *Wyatt* did not resolve the conflict. In the post-*Wyatt* era, I

imagine, most of our sister circuits will probably continue to make qualified immunity available to private defendants who perform governmental functions for governmental purposes. Several circuits have already done so – see, *e.g.*, *Williams v. O'Leary*, 55 F.3d 320 (7th Cir.), *cert. denied*, 116 S.Ct. 527 (1995) (private physicians whose employer held contract with state prison system to provide medical services for inmates could assert qualified immunity); *Warner v. Grand County*, 57 F.3d 962 (10th Cir. 1995) (director of a private "crisis center" who performed body cavity search at sheriff's request entitled to qualified immunity); *Leeks v. Cunningham*, 997 F.2d 1330 (11th Cir.), *cert. denied*, 114 S. Ct. 609 (1993) (private physician providing medical services under contract with county jail entitled to qualified immunity). Given *Duncan*, however, I do not believe that the qualified immunity option is currently open to our panel.

Except insofar as to the right to an interlocutory appeal is concerned, the courts' increasingly benign attitude toward summary judgment proceedings may frequently mean that there will be little practical difference between the good faith defense that was recognized in *Duncan* and the qualified immunity "defense" (arguably a misnomer, see *Duncan*, 844 F.2d at 1265) recognized by our sister circuits. The good faith defense is not before us now, however, and I intimate no view as to whether the defendants can prevail on such a defense under the facts of this case.

For the reasons stated, I concur in the affirmance of the district court's denial of qualified immunity.

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF TENNESSEE
COLUMBIA DIVISION

RONNIE MCKNIGHT	]	No. 1-94-0042
	]	Judge Higgins
v.	]	(Filed
JOHN REES, et al.	]	March 1, 1995)

ORDER

The Court has before it the defendants' objections (filed February 6, 1995; Docket Entry No. 30) to the Report and Recommendation (entered February 2, 1995; Docket Entry No. 26).

The Court has independently reviewed the Magistrate Judges findings and conclusions, the objections and the entire record.

The Court finds that the objections are without merit and are overruled.

The Report and Recommendation is adopted and approved.

Accordingly, the motion (filed December 2, 1994; Docket Entry No. 12) of the defendants, Daryll Richardson and John Walker, to dismiss on the basis of qualified immunity[1] is denied.

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[1] This Court has held previously that a private corporation and its employees operating a prison under contract with the state are not protected by qualified immunity. *See Manis v. Corrections Corp. of America*, 859 F. Supp. 302 (M.D. Tenn. 1994).

It is so ORDERED.

/s/ Thomas A. Higgins
Thomas A. Higgins
United States
District Judge
2-28-95

IN THE UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF TENNESSEE
COLUMBIA DIVISION

RONNIE MCKNIGHT	]	
	]	NO. 1:94-0042
v.	]	
	]	
JOHN REES, et al.	]	

TO: Honorable Thomas A. Higgins, District Judge

REPORT AND RECOMMENDATION

By an Order entered March 4, 1994, the Court referred the above captioned civil rights action to the Magistrate Judge for consideration of its malicious or frivolous nature, 28 U.S.C. § 1915(d); *Malone v. Colyer*, 710 F.2d. 258, 261 (6th Cir. 1983), and further proceedings, if necessary, under Rule 72(b) of the Federal Rules of Civil Procedure and Local Rules of Court.

Now pending before the Court is the motion to dismiss of the defendants Daryll Richardson and John Walker. (Docket Entry No. 12). For the reasons set out below, the Court recommends that the motion be denied.

I. BACKGROUND

Plaintiff Ronnie McKnight, currently an inmate of the Tennessee Department of Corrections ("TDOC") confined at the South Central Correctional Center ("SCCC"), filed this action *pro se* and *in forma pauperis* on March 3, 1994, under 42 U.S.C. § 1983. He seeks monetary relief for alleged violations of his constitutional rights which occurred at the SCCC. The plaintiff alleges that his Eighth

Amendment right to be free from cruel and unusual punishment was violated when he was subjected to excessively tight restraints during his transport to another prison. He asserts that the restraints caused him extreme pain and swelling which later required hospitalization. He asserts that his complaints about the restraints were ignored and even met with taunts from the defendants.

Pursuant to an Order entered July 6, 1994 (Docket Entry No. 7), process was issued to SCCC correctional officers Daryll Richardson and John Walker on the plaintiff's claim. The defendants were served with process and answered the complaint with a denial of constitutional wrongdoing. Discovery and other pretrial activity has occurred pursuant to a scheduling order. The matter is set for a jury trial on March 13, 1995.

II. CONCLUSIONS

The defense of qualified immunity is provided to government officials so that they can perform their duties without being exposed to lawsuits and liability for discretionary decisions made during the performance of their duties. *Anderson v. Creighton*, 483 U.S. 635, 638 (1987); *Poe v. Haydon*, 853 F.2d 418, 423 (6th Cir. 1988).

By their motion, the defendants assert that they are entitled to qualified immunity from any damages claim in this action. They assert that although they are not employed by the state but by a private corporation which

has contracted with the State[1], the public policy rationale underlying the qualified immunity defense applies as equally to their situation as it does to a defendant whose paycheck comes from the State of Tennessee.

The defense of qualified immunity for employees of the CCA has previously been rejected by this Court. *See Manis v. Corrections Corporation of America*, 859 F. Supp. 302 (M.D.Tenn.1994) (Memorandum and Order entered August 2, 1994) (attached). Although the defendants make a valiant effort to "row their boat upstream", see memorandum in support at p. 2., they fail to set forth a persuasive reason why the Court's decision in *Manis* should not control the qualified immunity analysis in this action. The safety net of qualified immunity will not prevent the defendants from being swept downstream to a trial of this action.

RECOMMENDATION

Based on the foregoing, the Court respectfully RECOMMENDS that the defendants' motion to dismiss be DENIED.

ANY OBJECTIONS to this Report and Recommendation must be filed with the Clerk of Court within ten (10) days of receipt of this notice, and must state with particularity the specific portions of this report, or the proposed findings or recommendation to which objection is

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[1] The defendants are employees of the Corrections Corporation of America, Inc. ("CCA") which has contracted with the State of Tennessee to operate the SCCC.

made. Failure to file written objections within the specified time can be deemed a waiver of the right to appeal the District Court's Order. *See Thomas v. Arn*, 474 U.S. 140 (1985); *United States v. Walters*, 638 F.2d. 947 (6th Cir. 1981).

Respectfully submitted,

/s/ Juliet E. Griffin
Juliet E. Griffin
UNITED STATES
MAGISTRATE JUDGE

ATTACHMENT To Report & Recommendation*
McKnight v. Rees 1:94-0042

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF TENNESSEE
COLUMBIA DIVISION

CARENCE MANIS	]	
V.	]	No. 1-92-0111
	]	Judge Higgins
CORRECTIONS	]	
CORPORATION	]	
OF AMERICA, et al.	]	

MEMORANDUM

The question has arisen whether a private corporation and its employees operating a prison under a contract with the State of Tennessee are protected from suit by the qualified immunity of public officials. For the reasons set forth below, the Court concludes that they are not.[1]

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* Reported at 850 F. Supp. 302 M.D.Tenn.1994.

[1] The defendants raised this issue by moving to dismiss the action on the basis of qualified immunity. *See* Defendants' motion (filed February 22, 1994; Docket Entry No. 35) to dismiss. The Magistrate Judge recommended that the qualified immunity defense was applicable to the defendants. *See* Report and Recommendation (entered April 5, 1994; Docket Entry No. 48). The Court, however, rejected this aspect of the Report and Recommendation, stating that it would set forth its reasons in a forthcoming memorandum. *See* Order (entered June 6, 1994; Docket Entry No. 60).

I.

The facts of this case are set forth in detail in the Report and Recommendation (Docket Entry No. 48) of the Magistrate Judge. In brief, they are as follows.

The plaintiff is a state inmate in the custody of the Tennessee Department of Correction. He is incarcerated at a prison operated by Corrections Corporation of America (CCA). CCA is a private corporation that operates some of Tennessee's prisons pursuant to a contract with the State.

The plaintiff has sued CCA and one of its employees under 42 U.S.C. § 1983.[2] He alleges that the defendants were deliberately indifferent to his serious medical needs in violation of the Eighth Amendment. The defendants moved to dismiss the action on the grounds that they are protected by the qualified immunity of public officials.

The Magistrate Judge concluded that certain questions of fact precluded dismissal of the action, but he recommended that qualified immunity should be applied to the defendants. In his opinion, "[c]reating an arbitrary distinction between prison officials who are government officials and prison officials who are private parties, despite the fact that they both perform the same functions, places form over substance and runs counter to the

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[2] By an amended complaint (filed March 8, 1994; Docket Entry 43) the plaintiff has added a private physician as a third defendant. The physician has not joined in the instant motion to dismiss. Thus, for present purposes, the Court uses the phrase "the defendants" to refer to CCA and its employee but not the physician.

rationales behind qualified immunity." Report and Recommendation at 8. The Court disagrees.

II.

Title 42 U.S.C. § 1983 "creates a species of tort liability that on its face admits of no immunities." *Imbler v. Pachtman*, 424 U.S. 409, 417, 96 S.Ct. 984, 988, 47 L.Ed.2d 128, 136 (1976). However, the Supreme Court has "accorded certain government officials either absolute or qualified immunity from suit if the 'tradition of immunity was so firmly rooted in the common law and was supported by such strong policy reasons that "Congress would have specifically so provided had it wished to abolish the doctrine." ' " *Wyatt v. Cole* 504 U.S. ___, 112 S.Ct. 1827, 1831, 118 L.Ed.2d, 504, 512 (1992) (quoting *Owen v. City of Independence*, 445 U.S. 622, 637, 100 S.Ct. 1398, 63 L.Ed.2d 673 (1980); *Pierson v. Ray*, 386 U.S. 547, 555, 87 S.Ct. 1213, 18 L.Ed.2d 288 (1967)).

Thus, immunity from suit under Section 1983 today depends on whether such an immunity was recognized at common law when the statute was enacted and whether public policy would support such an immunity.[3] The United States Court of Appeals for the Sixth Circuit has reduced this analysis to a concise two-part test: "The first part requires the party claiming immunity to show that the immunity was recognized at common law. The second part requires a showing of strong public policy reasons for granting such an immunity." *Duncan v. Peck*, 844 F.2d

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[3] Section 1983 originally was enacted by the 42nd Congress as Section 1 of the Civil Rights Act of 1871, 17 Stat. 13.

1261, 1264 (6th Cir. 1988). Indeed, in a somewhat different context, the Court of Appeals already has applied this analysis to the question presented here and concluded "[b]ecause we find no evidence that private parties were immune from suit at common law, and because the various rationales for good faith immunity are inapplicable to private parties, we hold that private parties are not eligible for immunity from suit." *Id.* (holding that private individual who seized property pursuant to unconstitutional state attachment statute was not protected by qualified immunity); *see also Wyatt v. Cole, supra,* (holding the same).

A. The Common Law.

There is no mistaking that the Supreme Court has taken an historical approach to determining the availability of immunity from suit under Section 1983. As noted above, the statute on its face does not provide for any immunities at all. However, the Court has recognized their existence, not by "judicial fiat," but "upon a considered inquiry into the immunity historically accorded the relevant official at common law and the interests behind it." *Imbler v. Pachtman,* 424 U.S. at 421, 96 S.Ct. at 990, 47 L.Ed.2d at 138. Assuming that the 42nd Congress was familiar with the immunities of public officials at common law, the Court has inferred from Congress' silence that it intended to preserve those immunities where they would not defeat the statute's purpose. *City of Newport v. Fact Concerts, Inc.,* 453 U.S. 247, 258-59, 101 S.Ct. 2748, 2755, 69 L.Ed.2d 616, 626-27 (1981); *Wyatt v. Cole,* 504 U.S. at ___, 112 S.Ct. at 1831, 118 L.Ed.2d at 512. The Court has never recognized any immunity under Section 1983

except where there was an historical antecedent at the time the statute was enacted. *See Malley v. Briggs,* 475 U.S. 335, 342, 106 S.Ct. 1092, 1096, 89 L.Ed.2d 271, 279 (1986) ("We reemphasize that our role is to interpret the intent of Congress in enacting § 1983, not to make a free-wheeling policy choice, and that we are guided by the common-law tradition.").

The Sixth Circuit has examined the common law origins of the immunity of public officials and determined that it never extended to private citizens:

> The common law doctrine of immunity from suit originated from the concept that because "the King can do no wrong," it would be a contradiction of his sovereignty to allow him to be sued as of right in his own courts. W. Prosser and W. Keeton, *The Law of Torts,* § 131 (5th ed. 1984). Gradually, this concept was broadened to cover other government officials. *Scheuer v. Rhodes,* 416 U.S. 232, 239, 94 S.Ct. 1683, 40 L.Ed.2d 90 (1974). Yet, we find no evidence that the common law ever extended the immunity to include private citizens.

Duncan v. Peck, 844 F.2d at 1264. This finding by the Court of Appeals – that the common law never extended immunity to private citizens – is fatal to the defendants' assertion of immunity in this case. As noted above, the only basis for immunity under Section 1983 is the assumption that the 42nd Congress was cognizant of the common law immunities of its day and intended to preserve them in Section 1983. There is, thus, no basis for concluding that private parties, such as these defendants, who would not have been entitled to immunity at common law, should be afforded immunity under Section 1983 today.

B. Public Policy.

Notwithstanding the lack of any historical basis for extending immunity to private citizens, the Magistrate Judge proceeded directly to the question of whether public policy favored the defendants being protected by qualified immunity in this case. Because the Court disagrees with the Magistrate Judge's conclusion on this point, it shall elaborate on the implicit danger of affording qualified immunity to private parties.

"Qualified immunity strikes a balance between compensating those who have been injured by official conduct and protecting government's ability to perform its traditional functions." *Wyatt*, 504 U.S. at ___, 112 S.Ct. at 1833, 118 L.Ed.2d at 514. Such a balance is necessary because of the conflict created by holding government officials personally liable for actions taken "under color of law." On the one hand, personal liability has the salutary effect of making public officials obey the law or compensate their victims when they do not. On the other hand, it has the perverse effect of inhibiting public officials in the proper performance of their duties, or even deterring talented candidates from entering public service altogether, out of fear of incurring monetary liability or harassing lawsuits. *Forrester v. White*, 484 U.S. 219, 223,108 S.Ct. 538, 542, 98 L.Ed.2d 555, 562-63 (1988); *Wyatt*, 504 U.S. at ___, 112 S.Ct. at 1833, 118 L.Ed.2d at 514-15. Thus, the Supreme Court has "accommodated these conflicting concerns by generally providing government officials performing discretionary functions with a qualified immunity, shielding them from civil damages liability as long as their actions could reasonably have been thought consistent with the rights they are alleged

to have violated." *Anderson v. Creighton*, 483 U.S. 635, 638, 107 S.Ct. 3034, 3038, 97 L.Ed.2d 523, 530 (1987). This qualified immunity protects earnest public officials who risk running afoul of the law in a genuine effort to serve the public. "In short, the qualified immunity . . . acts to safeguard government, and thereby to protect the public at large, not to benefit its agents." *Wyatt*, 504 U.S. at ___ 112 S.Ct. at 1833, 118 L.Ed.2d at 515.

A private party that performs a government function for a fee, however, is not faced with the conflict of public officials, for it is not principally interested in the good of the public at large. "[A] private party is governed only by self-interest and is not invested with the responsibility of executing the duties of a public official in the public interest." *Duncan*, S44 F.2d. at 1264; *see also Wyatt*, 504 U.S. at ___, 112 S.Ct. at 1833, 118 L.Ed.2d at 515 (private parties are not "principally concerned with enhancing the public good"). In the case of a private for profit corporation hired to perform a public function, there is an increased risk that the corporation's actions will diverge from the public interest. Unlike public officials, corporate officers and employees are hired to serve the interests of the corporation, and, more specifically, its stockholders, whose principal interest is earning a financial return on their investment. Indeed, corporate officers owe a fiduciary duty to advance stockholders' interests, but they owe no such fiduciary duty to the public at large. Thus, unlike public officials, corporate employees always are compelled to make decisions that will benefit their shareholders, without any direct consideration for the best interest of the public.

Especially when a private corporation is hired to operate a prison, there is an obvious temptation to skimp on civil rights whenever it would help to maximize shareholders' profits. Affording the shield of qualified immunity to a private corporation and its employees in these circumstances would directly contradict the policy behind qualified immunity: instead of promoting the public good by freeing public officials "to make decisions that are . . . above all . . . informed by considerations other than the personal interests of the decisionmaker," *Forrester*, 484 U.S. at 223, 108 S.Ct. at 542, 98 L.Ed.2d at 562, it would simply free a private corporation to maximize its profits, even at the cost of citizens' rights. In such circumstances, the threat of incurring money damages might provide the *only* incentive for a private corporation and its employees to respect the Constitution. Therefore, the best policy is not to afford them any immunity from suit.

CCA is a purely private corporation, and its employees are private individuals who have contracted to do the corporation's business. There is no compelling reason why these private parties should not have to come to court, like any other private party, to defend themselves when another citizen claims that they violated his legal rights. *See Wyatt*, 504 U.S. at ___, 112 S.Ct. at 1833-34, 118 L.Ed.2d at 515 ("[U]nlike with government officials . . . , the public interest will not be unduly impaired if private individuals are required to proceed to trial to resolve their legal disputes.").

III.

Because there is no precedent at common law for extending qualified immunity to private parties and because public policy disfavors such an extension, the Court concludes that the defendants in this case are not protected by qualified immunity.[4]

/s/ Thomas A. Higgins
Thomas A. Higgins
United States
District Judge
8-1-94

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[4] The Court is aware of only one other decision addressing the question of whether a corporation and its employees operating a prison under contract with a state are protected by the qualified immunity of public officials. In *Tinnen v. Corrections Corporation of America*, 91-2188-TUA (W.D. Tenn. Feb 22, 1994) (unpublished opinion), on facts almost – identical to those here, Judge Turner concluded that they were. His analysis was similar to that of the Magistrate Judge, reasoning that the similar "function" of public officials and private parties operating a prison justified extending qualified immunity to the latter. *Id.* at 6.

Of course, this Court is not bound by decisions from the Western District of Tennessee. For the reasons stated, the Court respectfully disagrees with Judge Turner's opinion.

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE AT
NASHVILLE, TENNESSEE

RONNIE McKNIGHT, Plaintiff, -VS- JOHN REES, Warden, CCA/SCCC South Central Correctional Center, C/O RICHARDSON, Correctional Officer (Transpertation [sic]), and C/O JOHN DOE, Correctional Officer (Transpertation [sic]) (real name is presently unknown) Defendants.	)	CASE NO. #1-94-0042 (Filed Mar. 3, 1994) JUDGE HIGGINS

CIVIL RIGHTS COMPLAINT UNDER
42 U.S.C. SECTION 1983

This is a CIVIL RIGHTS COMPLAINT seeking damages against the defendants for committing acts under COLOR OF STATE LAW, and depriving plaintiff of RIGHTS secured by the TENNESSEE STATE CONSTITUTION, and the UNITED STATES CONSTITUTIONS [sic]. Defendants, while acting in their individual and official capacites [sic] acted in concert, and in systematically and deliberately in violating plaintiff's Constitutionally Secured Rights, including, but not limited to, those enumerated in the succeeding paragraphs.

1. Rhis [sic] Court has JURISDICTION of this action under TITLE 42 U.S.C., SECTION 1983, for CIVIL RIGHTS VIOLATION COMPLAINT.

2. The JURISDICTION of this Court is further invoked pursuant to TITLE 28 U.S.C., SECTION 2201; and §1331.

I. PLAINTIFF:

1. Plaintiff, RONNIE McKNIGHT, is a citizen fo [sic] the UNITED STATES OF AMERICA, and a resident of the STATE OF TENNESSEE, and of the JURISDICTION and JUDICIAL DISTRICT of this HONORABLE COURT. (MIDDLE DISTRICT OF TENNESSEE)

2. Plaintiff is and was at all times mentioned in this complaint a "Prisoner" of the Tennessee State Department Of Correction via the Corrections Corporation Of America/South Central Correctional Center at P.O. Box 279 - Clifton, Tennessee 38425-0279, and in the costody [sic] of the defendant John Rees, Warden.

II. DEFENDANTS:

1. The Defendants, are all citizens of the UNITED STATES OF AMERICA, and residents of the STATE OF TENNESSEE, and all residents of the JURISDICTION and JUDICIAL DISTRICT of this HONORABLE COURT. (MIDDLE DISTRICT OF TENNESSEE)

2. The defendant JOHN REES, is the warden by title of the Corrections Corporarion [sic] Of America/South Central Correctional Center, and as such, pursuant to T.C.A. §41-1-104 (a) "The warden has the charge, custody and safekeeping and welfare of the prisoners" . . . He has the

charge and custody of the penitentiary, with the land, buildings, tools, implements, and every-other species (including his employees and subordinates) of property within the precincts thereof, . . . "

a). Paragraph (b) – "The custody, welfare, conduct, and safekeeping of the convicts *shall* be the responsibility of the warden. He *will* examine into the affairs of the Institution *daily* to assure that proper standards are maintained".

b). The warden is further and pursuant to the "Inate [sic] Orientation Handbook, Rules and Regulations therein. (Page 3, paragraph 1)" "Responsible for the conduct and actions of his employees and subordinates, including the defendants named in this inatant [sic] action. Further, "The Rights of the Convicts: "As an inmate of the Tennessee Department Of Correction – Corrections Corporation Of America/South Central Correctional Center, you have the right as a human-being to be treated RESPECTFULLY, IMPARTIALLY, and FAIRLY by all STAFF. Including the times when an inmate is being transported to and from another facility.

c). The warden is further and pursuant to T.C.A. §41-1-103 – Oath Of Officers and impolyees [sic] – (in part) "I do solemnly swear (or affirm) that I will fully, faithfully, impartially, and dillegently [sic] perform all of the duties (responsibilities) required of me as (warden) (correctional officers/transpotation [sic] officers) in the penitentiary; . . . and that I will on no occasion ILL-TREAT OR ABUSE any convict under my care, beyound [sic] the punishment ordered by law or the rules and regulations of the institution".

d). The defendant, Warden Rees is the chief administrative officer of Corrections Corporation Of Ameriac [sic]/ South Central Correctional Center, and as such, he is responsible for the administration of the facility, and of the custody, welfare, and safekeeping of the prisoners incarcerated therein. He is responsible for creating, promulating [sic], and maintaining interdepartmental rules and regulations that will protect the plaintiff (ocnvicts [sic]) form [sic] harsh, ill and abusive treatment, and of the actions of his officers, employees, staff, and subordinates (including the defendants named herein in this complaint and action).

2. The Defendant, C/O RICHARDSON, is a correctional officer by title of the Corrections Corporation Of Aremica [sic]/South Central Correctional Center, who at all times mentioned in this Complaint held the position of "Transportation Officer", and he was assigned to transportation on the 13th. day of September, 1993. He was charged with the responsibility and duty of transporting inmates (Plaintiff) to and from CCA/SCCC to Turner Center, located in Only, Tennessee.

a). Defendant C/O Richardson, was and continues to be in charge with the responsibility pursuant to T.C.C. §41-1-103 – Oath Of Officers and Employees: (in part) " . . . to fully, faithfully, impartially, and diligently perform all of the duties required of me as ___, (Correctional Officer – Transportation Officer) in the penitentiary (CCA/SCCC). I do solumly swear (or affirm) that I will execute the laws and regulations, and rules prescribed for the government of said institution, so far as concerns his (my) office . . . that I (he) will on no occasion, *ill-treat* or *abuse* any convict (plaintiff) under my (his) care, beyond

the punishment ordered by law, or the rules and regulations of the institution".

b). (c) "the violation of this oath by any of the officers or employees (including C/O Richerdson [sic]) shall be perjury, punishable as in other cases of perjury".

3. The Defendant, C/O JOHN DOE, is a correctional officer by title of the Corrections Corporation Of America/South Central Correctional Center, who at all times mentioned in this complaint held the position of "Transportation Officer", and assigned to the AM shift, he was assigned to transportation on the 13th. day of September, 1993. Defendant C/O John Doe, and defendant C/O Richardson were both assigned together as transportation officers on the 13th. day of September, 1993. Defendant C/O John Doe, is a caucasian approximately *5'10"* feet tall, *Dark* hair, and about *26/27* years old. He was on the 13th. day of September, 1993, charged with the responsibility and duty of transporting inmates (plaintiff) to and from CCA/SCCC to Turner Center, located in Only, Tennessee.

a). Defendant C/O John Doe, was and continues to be charged with the responsibility pursuant to T.C.A. §41-1-103 – Oath Of Officers and Employees: (in part) " . . . to fully, faithfully, impartially, and diligently perform all of the duties required of me as ___, (Correctional Officer – Transportation Officer) in the penitentiary (CCA/SCCC). I do solumly [sic] swear (or affirm) that I will execute the laws and regulations, and rules prescribed for the government of said institution, so far as concerns jis [sic] (my) office . . . that I (he) will on no occasion, *ill-treat* or *abuse* any convict (plaintiff) under my

(his) care, beyond the punishment ordered by law, or the rules and regulations of the institution".

b). (c) "the violation of this oath by any of the officers or employees (including C/O John Doe) shall be perjury, punishable as in other cases of perjury".

4. Both defendant C/O Richardson, and defendant C/O John Doe, are correctional officers and employees of the Corrections Corporation Of America/South Central Correctional Center, they are action [sic] under Color Of State Law, and pursuant to the Institutional Inmate Hand-Book, the Rules and Regulations therein. To Wit: (Page 3 – paragraph 1 – Inmates Rights. – "You have the right as an inmate to expect that as a human being you will be treated respectfully, impartially, and fairly by all departmental personnel. (including the defendants). See also: T.C.A. §41-1-103; and §41-1-104 (b) supra, and §41-1-116.

III. PREVIOUS LAWSUITS:

Plaintiff respectfully asserts that there have been no other lawsuits filed in the State or Federal Courts dealing with the same favts [sic] and circumstances involved in this action and complaint and/or otherwise relating to plaintiff's imprisonment.

IV. GRIEVANCE PROCEDURES:

a). Plaintiff respectfully asserts that he filed an Inmate's Grievance complaining of the ill treatment, abusive treatment, and abusive language that the defendants C/O Richardson, and C/O John Doe, subjected him to on September 13, 1993, further, plaintiff complainted [sic] of

the injuries that he suffered as a direct results [sic] of the defendant's actions and conduct. The Grievance Board Committee dismissed plaintiff's grievance and complaint, stating that this was not a grievance matter. Subsequently, plaintiff have been subjected to retaliation and reprisal from the defendants co-workers and correctional officers.

V. FACTS:

Plaintiff respectfully asserts that on the 13th. day of September, 1993, plaintiff was being transported from Middle Tennessee Reception Center – 7177 Cockrill Bend Industrial Road – Nashville, Tennessee, to Corrections Corporation Of Americe/South-Central Correctional Center – P.O. Box 279 – Clifton, Tennessee.

Upon plaintiff being secured and prepared for the bus transfer from Middle Tennessee Reception Center, the M.T.R.C. Transportation Officers ascertained and recognized plaintiff's physical size and health conditions, upon ascertaining that plaintiff's wrists and ankles was [sic] larger than normal and that plaintiff himself was a karge [sic] man. To Wot [sic]: Plaintiff is 49 years old, overweight and poor health; 302 lbs.; 5' 11" in hight [sic]; Ankle size larger than normal; Wrist size larger than normal; Waist 50".

Plaintiff asserts that the M.T.R.C. Transportation Officers determined that plaintiff's wrist was too large for the handcuffs to fit around, and that his ankles was [sic] to [sic] large for the leg shackles to fit around without great difficulty, and force, coupled with severe pain and suffering to the plaintiff, therefore the M.T.R.C. Transportation Officers determined that they would only put the Leg-Shcckles [sic] on plaintiff's wrists, and a waist chain

around his waist to secure plaintiff for the tranfer. Plaintiff had to be assisted in getting on the bus, because of his size, health conditions, and the cuffs and chain.

Plaintiff respectfully asserts that after arriving at Turner Center Prison in Only, Tennessee approxixately half way to CCA/SCCC – Clifton, Tennessee, that plaintiff and the other inmates had to change buses and transportation officers to complete the trip, that at this point the M.T.R.C. Transportation Officers removed the leg-shackles from around plaintiff's wrist, and the chain from around his waist and turned plaintiff over to the CCA/SCCC Transportation Officers (defendants C/O Richardson, and C/O John Doe. Thereupon the CCA/SCCC Transportation Officers took custody and charge of plaintiff.

Plaintiff respectfully asserts that upon preparing and securing plaintiff for transfer, that the defendants C/O Richardson, and C/O John Doe (Transporattion Officer from CCA/SCCC) forced the hand-cuffs around plaintiff's wrist, and forced the ankle cuffs/shackles around his ankles, and put the chain around his waist.

Plaintiff then complained that the cuffs was to tight, and was cutting off his blood circulation, and that he was in severe pain. Plaintiff was unable to get on the bus by himself, he had very little movement, therefore both defendants together pushed plaintiff up on the bus, plaintiff continued to plead with the defendants to please loosen the hand and leg cuffs, plaintiff also told the defendants that his arms and legs had started swelling and was causing more pain. Some of the other inmates on the bus also intervened and ask the defendants to loosen

the hand and leg cuffs, because my legs and arms was turning colors and swelling up.

The defendants, both of them, acting both individually and in a concert of action wherein each said defendant acquiesced, condoned, encouraged, and assisted the actions of the other in a deliberate effort to single out plaintiff for harsh, arbitrary, discriminatory and ill and abusive treatment with regards to cuffing and shackling plaintiff beyond what was necessary in knowing disregard of the fact that plaintiff's constitutional rights prohibiting cruel and unusual punishment under the Eighth Amendment were thereby violated.

The above described actions by Defendants, and each of them, deprived Plaintiff of his Civil Rights, including his rights to be treated as a human, and to be free from cruel and unusual punishment as guaranteed by the Eighth Amendment to the United States Constitution, and by Title 42 of the United States Code, Section 1983, and Tennessee Statutory and Constitutional Law.

Plaintiff respectfully asserts that during the course of the trip from Turner Center prison, Only, Tennessee, to Corrections Corporation Of America/South Central Correctional Center, Clifton, Tennessee, the defendants made several demeaning, degrading, hurtful, slanderous, and condescending remarks and statements to plaintiff, in regards to plaintiff's criminal offense and conviction, and stating that plaintiff was getting what he deserved; That a low-down scum like me should suffer; When plaintiff inquired about how long the trip would take, he was told to set [sic] down and shut up and that it was none of his damn business; When plaintiff requested again that the

cuffs and leg shackles be loosen [sic] and adjusted, he was told to suffer.

Plaintiff respectfully asserts that when the bus arrived at CCA/SCCC, that he was unable to get off the bus by himself, and that walking was impossible without the assistance of other inmates, plaintiff had to see the medical personnel immediately because of the severe pain to his legs and arms, coupled with the swelling of his legs and arms, plaintiff was hospitalized because of his conditions resulting from the cuffs and leg shackles being put on him to [sic] tight, and cutting off the blood circulation in his arms and legs for more than a hour and half (1½ hours). Plaintiff continues to be under the doctor's care and treatment, and receives medications for his legs and arms, and blood circulation.

Plaintiff respectfully asserts that the ill and abusive treatment, coupled with the discriminatory, savage, and inhumane treatment, and further, the disdainful, condescending, and prejudice attitudes, acts and conduct of the defendants C/O Richardson, and C/O John Doe (transportation officers) and against the plaintiff, has caused, and contniues [sic] to cause plaintiff mental anguish, anxiety and depression, in addition to the various symptoms of physical ailments to plaintiff's arms, and legs, and other physical ailments that he suffers as a direct result of the defendants, each of them, forcing "to [sic] small", "tight fitting", "cttting [sic] and cramping", "improperly adjusted" hand cuffs and leg shackles on plaintiff, and dispite [sic] plaintiff's complaints and cries for mercy and some relief. The defendants, each of them, with full knowledge, deliberately, intentionally, and wilfully failed and refused to correct and to alleviate such

inhumane conditions, in violation of the Eighth Amendment Rights of plaintiff to be free from cruel and unusual punishment.

VI. LEGAL CLAIMS:

Plaintiff respectfully asserts that defendant C/O Richardson, and defendant C/O John Doe, was and continues to be in violation of his Tennessee State, and United States Constitutional Rights by their acts, actions, and conduct as herein described and complained of, supra. Specificially plaintiff's Eighth Amendment Rights. [The right to be free from crual [sic] and unusual punishment] [The prohibition against inflammatory, and discriminatory slurs, remarks, language, and treatment], and plaintiff's rights to be treated as a human and pursuant to T.C.A. §39-16-402. – Official Conduct and Misconduct Of The Convict, §39-16-403. – Official Oppression, T.C.A. §41-1-103. – Oath Of Officers and Employees; §41-1-116. – Qualifications Of Correctional Officers; and Title 42 U.S.C. Section 1983, for Civil Rights Violation Complaints.

Plaintiff respectfully asserts that as a proximate result of the unconstitutional treatment, the inhumane and abusive treatment, the discriminatory and prejudice attitudes acts, and conduct of the defendants, coupled with the demeaning, degrading, slanderous, and condescending slurs and remarks, the mental abuse that the defendants subjected the plaintiff to, and in addition to the physical ailments as described and complained of which he is entitled to recover damages jointly and severally from each of the defendants

VII. PRAYER FOR RELIEF:

WHEREFORE:

Plaintiff respectfully request and prays of this Honorable Court:

1. That this plaintiff be awarded a judgment against each of the defendants jointly and severally, for compensatory damages in the amount of TWO-HUNDRED THOUSAND ($200,000.00) DOLLARS, and including incidental damages. And punitive damages for the violation of plaintiff's Civil Rights in the amount of TWO-HUNDRED THOUSAND ($200,000.00) DOLLARS.

2. That plaintiff be able to recover the costs of this cause, action and complaint.

3. That plaintiff be awarded reasonable expenses and attorney fees pursuant to the provisions of Title 42 U.S.C., SECTION 1983, and SECTION 1988.

4. That a jury be impaneled to try this cause.

5. That plaintiff be awarded such other, further, and necessary relief as this Court seems just, proper and equitable.

Respectfully Submitted,

/s/ Ronnie L. McKnight
RONNIE L. McKNIGHT, pro se.
#222102 – Unit – Apollo AA
CCA/SCCC – P.O. Box 279
Clifton, Tennessee 38425-0279

Subscribed to and sworn before me
this 24th day of February, 1994.

/s/ _____
Notary Public

My Commission Expires: 07/21/97.

THE PRIVATE PRISON CONTRACTING ACT OF 1986
T.C.A. § 41-24-101 et seq.

41-24-101. Short title. – This chapter is designated as the "Private Prison Contracting Act of 1986."

41-24-102. Definitions. – As used in this chapter, unless the context otherwise requires:

(1) "Commissioner" means the commissioner of correction;

(2) "Correctional services" means the following functions, services and activities, when provided within a prison or otherwise:

(A) Education, training and jobs programs;

(B) Recreational, religious and other activities;

(C) Development and implementation assistance for classification, management information systems, or other information systems or services;

(D) Food services, commissary, medical services, transportation, sanitation or other ancillary services;

(E) Counseling, special treatment programs, or other programs for special needs; and

(F) Operation of facilities, including management, custody of inmates, and providing security;

(3) "Department" means the department of correction;

(4)

"Prison" or "facility" means any adult institution operated by or under the authority of the department; and

(5) "Prison contactor" or "contractor" means any entity entering a contractual agreement with the commissioner to provide correctional services to inmates under the custody of the department.

41-24-103. Contracts for correctional services. – (a) The commissioner is authorized to enter into contracts for correctional services only as provided in this chapter.

(b) Contracts for correctional services as defined in § 41-24-102(2) may be entered into subject to the requirements and procedures of §§ 12-4-109 and 12-4-110, and any additional requirements specified in this chapter.

(c) A contract for correctional services as defined in § 41-24-102(2)(F) is authorized only for one (1) medium security or minimum security facility opened after July 1, 1991, and only according to the requirements and procedures specified in this chapter. No such contract shall be authorized for a facility intended primarily to serve special needs inmates.

(d) Any inmate sentenced to confinement in the department shall be legally eligible to be incarcerated in a facility in which a prison contractor is providing correctional services pursuant to this chapter.

41-24-104. Review and approval of contract proposals – Price and cost adjustments – Cancellations. – (a) Any contract for correctional services as defined in § 41-24-102(2)(F) shall be entered into only after each of the following requirements and/or conditions are met:

(1) Any request for proposals, any original contract, any contract renewal and any price and/or cost adjustment or any other amendment to any contract shall first be approved by the following:

(A) The state building commission;

(B) The attorney general and reporter; and

(C) The commissioner of correction;

(2) Each of the following committees shall review any request for proposals, any original contract, and any proposed contract renewal:

(A) Select oversight committee on corrections;

(B) Fiscal review committee;

(C) Senate state and local governmental committee; and

(D) House state and local government committee;

(3) To be considered for an award of a contract, the proposer must demonstrate to the satisfaction of each of the officials set forth in subdivision (a)(1) that it has:

(A) The qualifications, operations and management experience and experienced personnel necessary to carry out the terms of the contract;

(B) The ability to comply with applicable correctional standards and specific court orders, if required; and

(C) Demonstrated history of successful operation and management of other correctional facilities; and

(4) Proposer must agree that the state may cancel the contract at any time after the first year of operation,

without penalty to the state, upon giving ninety (90) days written notice.

(b)(1) Any such contract may provide for annual contract price and/or cost adjustments; provided, that any such adjustments may be made only once each year effective upon the anniversary of the effective date of the contract. If any adjustment is made pursuant to terms of the contract, it shall be applied to total payments made to the contractor for the previous contract year and shall not exceed the percent of change in the average consumer price index (all items-city average) which is published by the United States department of labor, bureau of labor statistics, between that figure for the latest calendar year and the next previous calendar year.

(2) Any price and/or cost adjustments to any such contract different than those authorized by subsection (b)(1) may be made only if the general assembly specifically authorizes such adjustments and appropriates funds for such purpose, if required.

(c)(1) No award of any such contact shall be made unless an acceptable proposal is received pursuant to any request for proposal. An "acceptable" proposal means a proposal which meets all the requirements and/or conditions set forth in this chapter and meets all the requirements in the request for proposal.

(2) No proposal shall be accepted unless:

(A) Such proposal offers a level and quality of services which are at least equal to those which would be provided by the state; and

(B) The cost of the private operation, plus the state's cost for monitoring the private operation, are

no greater than the state's cost for operating a medium or minimum security prison of like design.

(3) The select oversight committee on corrections, or any other committee designated by the speakers of the senate and house, shall review the proposals and shall advise the persons listed in subdivision (a)(1) of the level and quality of services proposed.

(4) Should the state be required to assume the operation of any facility contracted under the provisions of this chapter, preference in state employment shall be given to persons who are employees of the contractor at the time of the state's assumption of operation of such facility.

(5) Any preference in employment must be in compliance with the provisions of title 8, chapter 30, and § 41-1-116, and performance of duties as an employee of the contractor must have been satisfactory.

41-24-105. Term of contract – Review of performance – Renewal. – (a) For any contact to provide correctional services as defined in § 41-24-102(2)(F), the initial contract term shall be for a period of three (3) years in order to allow the contractor sufficient time to demonstrate its performance and to provide sufficient information to allow a comparison of the performance of the contractor to the performance of the state in operating similar facilities.

(b) The initial contract may include an option to renew for an additional period of two (2) years.

(c) After the first two (2) years of operation, but before renewing the initial contract, the performance of he contractor shall be compared to the performance of the

state in operating similar facilities, as provided in this section.

(d) The contract may be renewed only if the contractor is providing at least the same quality of services as the state at a lower cost, or if the contractor is providing services superior in quality to those provided by the state at essentially the same cost.

(e) The quality of services provided by the contractor and by the state at similar facilities shall be compared by the select oversight committee on corrections, or any other committee designated by the speakers of the senate and house. The committee shall determine whether the services provided by the contractor are superior, essentially equal, or poorer than services provided by the state. In making its determination, the committee shall consider, among other factors; the nature of inmates in the facilities; whether the facilities meet professional standards; the level of training provided staff and the level of training accomplished by staff; the number and nature of complaints against staff; the number and nature of violent or other disruptive incidents among inmates or against staff; the number of escapes and attempted escapes; the number and nature of disciplinary actions against inmates and staff; the number of inmates productively active, the level of production, and the nature of the activity provided inmates; the rate at which inmates complete programs successfully; or other matters related to the quality of services provided. The committee shall report its determination to the parties responsible for determining whether the contract should be renewed.

(f) The fiscal review committee, or any other committee designated by the speakers of the senate and house, shall compare the full costs of the contractor with the state's full costs of operating similar facilities. The committee shall determine whether the contractor is providing services at greater, essentially equal, or lower cost. In making its determination, the committee shall consider all relevant costs of operation, including direct and indirect costs which should be allocated or assigned to the operations. The costs attributable to the contractor shall include any costs of monitoring the contract incurred by the department of correction or any other state agency which would not have been incurred by the state otherwise. The committee shall report its determination to the parties responsible for determining whether the contract should be renewed.

41-24-106. Standards of security – Resumption of state control on termination of contract. – Notwithstanding any other provision of this chapter to the contrary, prior to entering a contract for providing the security function for any prison, such as providing correctional officers or other persons providing security and control over inmates, the following requirements shall be met:

(1) A plan shall be developed and certified by the governor which demonstrates the method by which the state would resume control of the prison upon contract termination. Such plan shall be submitted for review and comment to the select oversight committee on corrections and the oversight committee shall solicit comments from law enforcement agencies, district attorneys general, criminal judges in the county in which the prison is located and the surrounding counties. State officials

responsible for approving any contract for the security function or any contract which includes provision of security are encouraged to await the comments of the oversight committee prior to executing any such contract; and

(2) The commissioner shall certify to the select oversight committee on corrections that the security procedures proposed by the contractor are equal or superior to the security procedures in effect at existing state-operated prisons and the commissioner shall comment on the relationship of the procedures proposed by the contractor to each standard of security and control specified in the standards for adult correctional institutions by the American Correctional Association.

41-24-107. Financial information from contractor – Insurance requirements – Sovereign immunity. – (a) Notwithstanding any other provision of this chapter to the contrary, no contract for correctional services as defined in § 41-24-102(2)(F), shall be entered into unless the following requirements are met:

(1) The contractor provides audited financial statements for the previous five (5) years or for each of the years the contractor has been in operation, if fewer than five (5) years, and provides other financial information as requested; and

(2) The contractor provides an adequate plan of insurance, specifically including insurance for civil rights claims, as determined by an independent risk management/actuarial firm with demonstrated experience in public liability for state governments. Such firm shall be selected by the commissioner of commerce and insurance

with the concurrence of the board of claims. In determining the adequacy of the plan, such firm shall determine whether:

(A) The insurance is adequate to protect the state from any and all actions by a third party against the contractor or the state as a result of the contract;

(B) The insurance is adequate to protect the state against any and all claims arising as a result of any occurrence during the term of the contract; that is, the insurance is adequate on an occurrence basis, not on a claims-made basis;

(C) The insurance is adequate to assure the contractor's ability to fulfill its contract with the state in all respects, and to assure that the contractor is not limited in this ability because of financial liability which results from judgments; and

(D) The insurance is adequate to satisfy such other requirements specified by the independent risk management/actuarial firm.

(b) The sovereign immunity of the state shall not apply to the contractor. Neither the contractor nor the insuror of the contractor may plead the defense of sovereign immunity in any action arising out of the performance of the contract.

41-24-108. Application of certain criminal laws to contractor-operated facilities. – The provisions of title 39, chapter 5 [repealed], including without limitation § 39-5-201 [repealed] and part 7 [repealed], and the provisions of title 39, chapter 16, including without limitation § 39-16-201 and §§ 39-16-605 – 39-16-608, shall apply to offenses committed by or with regard to inmates assigned

to facilities or programs for which a prison contractor is providing correctional services.

41-24-109. Monitoring of contractor performance – Reports. – In addition to other powers and duties prescribed by law, the commissioner shall monitor any contracts with prison contractors providing correctional services and shall report at least annually or as requested to the select oversight committee on corrections or any other legislative committee on the performance of the contractor.

41-24-110. Powers and duties not delegable to contractor. – No contract for correctional services shall authorize, allow or imply a delegation of the authority or responsibility of the commissioner to a prison contractor for any of the following:

(1) Developing and implementing procedures for calculating inmate release and parole eligibility dates;

(2) Developing and implementing procedures for calculating and awarding sentence credits;

(3) Approving inmates for furlough and work release;

(4) approving the type of work inmates may perform, and the wages or sentence credits which may be given to inmates engaging in such work; and

(5) Granting, denying or revoking sentence credits; placing an inmate under less restrictive custody or more restrictive custody; or taking any disciplinary actions.

41-24-111. Application of certain administrative laws to contractor. – All existing provisions of law shall

apply to a prison contractor except as provided in this section or otherwise provided in this chapter:

(1) Title 12, chapter 3, relative to public purchases, shall not apply to purchases and procurements of a prison contractor providing correctional services;

(2) Title 8, chapter 30, relative to civil service, shall not apply to employees of a prison contractor;

(3) A prison contractor providing correctional services shall not be bound by provisions of law governing the appointment, qualifications and duties of wardens, superintendents and other correctional employees, including provisions of title 4, chapter 6, and chapter 1 of this title, except as required to comply with the Constitution of Tennessee; and

(4) Title 8, chapters 34 and 35, relative to membership in the Tennessee consolidated retirement system, shall not apply to employees of a prison contractor except as provided specifically in this chapter.

41-24-112. Consolidated retirement system. – (a) The following provisions shall govern eligibility for membership in the Tennessee consolidated retirement system for employees of a prison contractor providing correctional services as defined in § 41-24-102(2)(F):

(1) Department of correction employees in positions under the control and supervision of the department which become subject to a contract with a prison contractor and who are members of the retirement system immediately preceding the contract implementation date shall remain eligible to continue membership under the same conditions that apply to state employees. Such employees

shall make the same contributions and be eligible for the same benefits as state employees; and

(2) Any other person, including any person employed or re-employed after the date a prison contractor assumes the management and operation of a department facility, shall not be eligible for membership in the Tennessee consolidated retirement system.

(b) An employee who participates in the retirement system may not participate in any retirement plan offered by the prison contractor. Any employee eligible under subsection (a) may continue membership or may elect to withdraw membership from the retirement system as follows:

(1) Such election to withdraw shall take place within thirty (30) days after the employee completes one (1) year of employment under the prison contractor;

(2) Upon the election to withdraw, the employee may receive a refund of accumulated contributions;

(3) The election to withdraw constitutes a waiver of any right, present or future, to re-establish such service at a later date based on employment at a correctional facility under a prison contractor; and

(4) If an election to withdraw is not made within the thirty-day period, the employee shall be deemed to have elected continued membership in the retirement system. Withdrawal at a later date will be permitted only upon the termination of service with the prison contractor.

(c) In no event will a department employee be allowed to retire and receive benefits while continuing employment with a prison contractor.

(d) The prison contractor shall make normal contributions, special accrued liability contributions, and cost of living contributions, as determined by an actuarial valuation, in the same way as for state employee members, for one (1) year for each employee described in subsection (b) and for each employee who thereafter elects to continue membership in the retirement system.

(e) The prison contractor shall pay contributions to the board of trustees of the retirement system according to a schedule set by the board.

(f) The department shall serve as administrative agent between the prison contractor and the Tennessee consolidated retirement system.

41-24-113. Rights of employees of contractor. – (a) The following provisions shall govern the rights of employees of the state who become employees of the contractor.

(b) Any employee of the contractor who was formerly an employee of the state shall have the following rights while in the employ of the contractor:

(1) Such employees shall be allowed to be a member of any qualified employee organization pursuant to § 8-23-204 and such employee shall be allowed, if he so elects, to pay dues in such qualified employee organization through payroll deduction; provided, that no employee of a contractor shall be deemed a state employee for the purpose of determining whether a given employee organization qualifies for payroll deduction of membership dues pursuant to § 8-23-204 nor shall such employee's membership in any employee organization

qualified under § 8-23-204 be considered to be a violation of § 8-23-204;

(2) The contractor shall give a hiring preference for available positions to laid-off employees of the department of correction; and

(3) Employees laid off by the contractor shall be given the same re-employment rights with the state as current state employees.

(c) Any employee of the contractor who was formerly a state employee, who ceases employment with the contractor, and returns to the employ of the state, shall have the following rights:

(1) Such employee shall retain all sick leave and annual leave which has been accumulated, but not greater than the amounts of leave which would have been accumulated had the employee been continuously in the employ of the state;

(2) Such employee shall be credited with any time of service with the contractor toward calculation of longevity pay benefits; and

(3) Such employee shall be admitted to the state group insurance program without proof of insurability.

41-24-114

Repealed

41-24-115. Rules and regulations. – The commissioner is authorized and directed to promulgate rules and regulations pursuant to the Uniform Administrative

Procedures Act, compiled in title 4, chapter 5, as required to effectuate the purposes of this chapter.

Supreme Court, U.S.
FILED
OCT 24 1996
CLERK

No. 96-318

IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

DARYLL RICHARDSON AND JOHN WALKER,
Petitioners,

v.

RONNIE LEE MCKNIGHT,
Respondent.

On Petition For A Writ Of Certiorari To The
United States Court Of Appeals
For The Sixth Circuit

BRIEF IN OPPOSITION

David C. Vladeck
Counsel of Record
Public Citizen Litigation Group
1600 20th Street, N.W.
Washington, D.C. 20009-1001
(202) 588-1000

Counsel for Respondent

October 25, 1996

15 pp

QUESTION PRESENTED

Are employees of a private, for-profit corrections corporation that performs some of the duties traditionally performed by a state department of corrections entitled to assert the defense of qualified immunity in a damage action brought under 42 U.S.C. § 1983, despite this Court's holding in *Wyatt v. Cole*, 504 U.S. 158 (1992), that private defendants may not invoke qualified immunity in a § 1983 action?

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On Petition For A Writ Of Certiorari To The
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For The Sixth Circuit

BRIEF IN OPPOSITION

STATEMENT OF THE CASE

A. Factual Background

Respondent Ronnie Lee McKnight is a prisoner at the South-Central Correctional Center (SCCC) in Tennessee. He filed an action for damages under 42 U.S.C. § 1983 against petitioners Daryll Richardson and John Walker, two prison guards employed by the Corrections Corporation of America (CCA), a private, for-profit corporation that operates the SCCC under contract with the Tennessee State Department of Corrections pursuant to Tennessee's Private Prison Contracting Act of 1986, T.C.A. § 41-24-101 *et seq*. Mr. McKnight asserts that the petitioners infringed his Eighth Amendment right to be free from cruel and unusual punishment by transporting him to the SCCC in handcuffs and ankle shackles that were far too tight for his large frame,

while showering him with abusive language and telling him to "suffer." Pet. App. at 46, 47. Mr. McKnight, who weighs 302 pounds and is in poor health, alleges that the cuffs and shackles cut off his circulation and caused extreme pain and swelling. *Id.* at 44-46. His discomfort was so evident that other inmates on the bus pleaded with petitioners to loosen the restraints. *Id.* at 45-46. By the time Mr. McKnight arrived at the SCCC, he could not walk without assistance. *Id.* at 47. His injury from the cuffs and shackles was so severe that he required hospitalization, and he continues to receive treatment to improve the blood circulation to his limbs. *Id.*

B. Decisions Below

Respondent filed this action on March 3, 1994, in the United States District Court for the Middle District of Tennessee against the two correctional guards responsible for his transportation.[1] Despite their status as employees of a private corporation, petitioners moved to dismiss on the basis of qualified immunity. Petitioners' motion was referred to a Magistrate Judge, who recommended that it be denied on the basis of *Manis v. Corrections Corporation of America*, 859 F. Supp. 302 (M.D. Tenn. 1994), which had rejected a qualified immunity defense for other employees of the CCA. The district court agreed, and overruled petitioners' objections. Pet. App. at 23. Petitioners filed an interlocutory appeal with the Sixth Circuit.

The Sixth Circuit affirmed, holding that private guards employed by a for-profit corporation that operates a correctional facility under contract with a state are not entitled to qualified immunity. *McKnight v. Rees*, 88 F.3d 417 (6th Cir. 1996). Relying on the statement in *Wyatt v.*

[1] Mr. McKnight also brought suit against John Rees, the Warden of the SCCC, but that claim was dismissed, and that dismissal is not before the Court.

Cole, 504 U.S. 158, 168 (1992), that "the rationales mandating qualified immunity for public officials are not applicable to private parties," the Sixth Circuit noted that, while qualified immunity is needed to protect "a government actor acting for the good of the state," it is not warranted for "a private actor acting for the good of the pocketbook," who has a "greater incentive to cut costs by infringing upon the constitutional rights of prisoners." Pet. App. 15 n.4, 16. Judge David A. Nelson concurred in a separate opinion. He agreed that both *Wyatt v. Cole* and the Sixth Circuit's decision in *Duncan v. Peck*, 844 F.2d 1261 (6th Cir. 1988), compelled the panel's ruling. Pet. App. 20-21. Judge Nelson noted, however, that if the panel were free to decide the case on public policy grounds, he would find that the petitioners were entitled to a qualified immunity defense. Pet. App. 19-20.

REASONS FOR DENYING THE WRIT

This Court should deny review. While petitioners are correct that the lower courts that have considered whether private actors are ever entitled to qualified immunity have reached conflicting conclusions, the decision below is the only appellate ruling on the precise question at issue here — namely, whether low-level employees of a private correctional institution should be entitled to qualified immunity. This issue has not been fully explored by the lower courts, and this Court's review would be premature where no circuit split has yet emerged. Moreover, for the reasons detailed below, the Sixth Circuit's decision is plainly consistent with this Court's qualified immunity precedents, and hence this Court's review is not required to rectify a clear error by a lower court.

I. THERE IS NO SPLIT AMONG THE CIRCUITS.

The Sixth Circuit is the first circuit to address the eligibility of privately employed prison guards for qualified immunity in a § 1983 action. Petitioners suggest that other circuits have ruled on related issues in a way that would indicate that they might resolve this question differently than the Sixth Circuit. Pet. at 12-13. But petitioners' speculation is based on cases involving high-level professionals who exercised significant discretion — a critical factor under a *Wyatt v. Cole* analysis. *See, e.g., Williams v. O'Leary*, 55 F.3d 320 (7th Cir.), *cert. denied*, 116 S. Ct. 527 (1995) (granting qualified immunity to private physician whose private employer held state contract to provide medical care to state prison system); *Leeks v. Cunningham*, 997 F.2d 1330 (11th Cir.), *cert. denied*, 114 S. Ct. 609 (1993) (granting qualified immunity to private physician under contract to provide medical services to county jail). No other circuit has address the qualified immunity issue in a case involving low-level employees, such as the prison guard petitioners here.

Respondent submits that, given the particular complexity of the qualified immunity issue in a prison context, where the potential for civil rights abuse is high, and given that consideration of this question has just begun in the lower federal courts, this Court should permit the issue to be considered in greater depth by the lower courts, and intervene only when, and if, an actual circuit split emerges.[2]

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[2] Excluding the instant case, there are only four district court decisions exploring the justifications for granting or denying immunity to privately employed prison guards. *See Citrano v. Allen Correctional Ctr.*, 891 F. Supp. 312 (W.D. La. 1995) (extending qualified immunity to private correctional officers); *Smith v. United States*, 850 F. Supp. 984 (M.D. Fla. 1994) (same); *Tinnen v. Corrections Corporation of America*, 1993 WL 738121 (W.D. Tenn. 1993) (unpublished) (same); *Manis v.* (continued...)

II. THE SIXTH CIRCUIT'S DECISION IS CONSISTENT WITH THIS COURT'S HOLDING IN *WYATT v. COLE*.

In *Wyatt v. Cole*, this Court "granted certiorari . . . to resolve a conflict among the Courts of Appeal over whether private defendants threatened with 42 U.S.C. § 1983 liability are, like certain government officials, entitled to qualified immunity from suit." 504 U.S. at 161. Having answered that question in the negative, there is no need for the Court to revisit a functionally identical question in this case.

As the Court noted in *Owens v. City of Independence*, 445 U.S. 622 (1980), immunity, either absolute or qualified, is only available to government officials where "the tradition of immunity was so firmly rooted in the common law *and* was supported by such strong policy reasons that 'Congress would have specifically so provided had it wished to abolish the doctrine.'" *Id.* at 164 (quoting *Pierson v. Ray*, 386 U.S. 547, 555 (1967)) (emphasis added). Petitioners do not argue that there is any common law basis for conferring qualified immunity on privately-employed prison officers. Rather, petitioners contend that, because private prison guards perform many of the functions historically performed by state employees, they should, as a matter of policy, be extended the same degree of protection from suits alleging violations of civil rights.

But this argument runs counter to the Court's reasoning in *Wyatt*. There, this Court held that "the rationales mandating qualified immunity for public officials are not applicable to private parties," 504 U.S. at 167, because "the nexus between private parties and the historic purposes of

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[2](...continued)
Corrections Corp. of America, 859 F. Supp. 302 (M.D. Tenn. 1994) (refusing to grant qualified immunity to private correctional officers).

qualified immunity is simply too attenuated to justify such an extension of our doctrine of immunity." *Id.* at 168. For public officials performing discretionary functions, qualified immunity is necessary to "preserve their ability to serve the public good," and "to ensure that talented candidates [are] not deterred by the threat of damages suits from entering public service." *Id.* at 1833. Private parties, in sharp contrast, "hold no office requiring the exercise of discretion; nor are they principally concerned with enhancing the public good." *Id.*

Wyatt also emphasized that the protection of qualified immunity "acts to safeguard government, and thereby to protect the public at large, not to benefit its agents." *Id.* Thus, the relevant inquiry is not whether these specific petitioners might be distracted from their functions by the pendency of a lawsuit against them, but whether private corrections corporations, *as institutions,* can function smoothly and recruit employees in the absence of qualified immunity.

The Sixth Circuit examined this very issue and correctly held that the justifications for extending qualified immunity to private corrections corporations' employees are unpersuasive:

> [W]hile privately employed correctional officers are serving the public interest by maintaining a correctional facility, they are not principally motivated by a desire to further the interest of the public at large. Rather, as employees of a private corporation seeking to maximize profits, correctional officers act, at least in part, out of a desire to maintain the profitability of the corporation for whom they labor, thereby ensuring their own job security.

Pet. App. at 15. Given that "private corporations running correctional facilities have a greater incentive to cut costs by

infringing upon the constitutional rights of prisoners in order to ensure the profitability of the enterprise," Pet. App. at 16, public policy considerations militate against conferring qualified immunity on privately employed correctional officers.

This Court has *never* held that a private actor is entitled to qualified immunity under § 1983, even when presented with markedly more sympathetic facts than here. In *Wyatt*, this Court held that qualified immunity was unavailable to private-party defendants even where they had relied in good faith on the constitutionality of a state statute. In the instant case, private-party defendants neither acted in concert with state actors, nor relied on state statutes or policies, nor in any way took their guidance from the state in manifesting indifference to a prisoner's dire medical needs. Even the narrowest reading of *Wyatt* confirms the correctness of the Sixth Circuit's holding that, in these circumstances, private prison guards are not entitled to qualified immunity.

Finally, it bears noting that the Tennessee Legislature left no doubt that it did not intend to confer sovereign immunity on CCA or other private corrections contractors. T.C.A. § 41-24-107 provides that:

> The sovereign immunity of the state shall not apply to the contractor. Neither the contractor nor the insurer of the contractor may plead the defense of sovereign immunity in any action arising out of the performance of the contract.

Surely, if the Tennessee Legislature saw no reason to afford CCA and its employees immunity from general state law claims, there is no policy justification for providing immunity from civil rights actions, such as the one respondent has filed.

III. THE DENIAL OF QUALIFIED IMMUNITY DOES NOT MEAN THAT PRIVATE PARTIES WILL BE SUBJECTED TO SUBSTANTIAL LITIGATION BURDENS.

To the extent that petitioners argue that a qualified immunity defense must be available to private correctional guards to insulate them from the burdens of defending claims, Pet. at 15, their argument is substantially overstated. In *Wyatt*, this Court noted that "an affirmative defense based on good faith and/or probable cause" could potentially be available to "private defendants faced with § 1983 liability." 504 U.S. at 169. Indeed, on remand, the Fifth Circuit in *Wyatt* recognized such a "good faith" defense and affirmed the no-liability finding of the district court. 994 F.2d 1113 (5th Cir. 1993).

The Sixth Circuit similarly recognizes a good faith defense for private parties in § 1983 actions. *See Duncan v. Peck*, 844 F.2d 1261 (6th Cir. 1988) (granting summary judgment for private-party defendant who established a good faith defense); *Vector Research v. Howard & Howard Attys. P.C.*, 76 F.3d 692 (6th Cir. 1996) (holding that private-actor defendants had a good-faith defense to a *Bivens* claim, which the court noted was the federal-officer counterpart to a § 1983 action). The Third Circuit, too, recognizes that private parties acting under color of law are entitled to a good faith defense where there is no proof that they subjectively appreciated the unlawfulness of their conduct. *Jordon v. Rothschild*, 20 F.3d 1250 (3d Cir. 1994).

As Justice Kennedy noted in his concurrence in *Wyatt*, which was joined by Justice Scalia, although the departure from common law immunity principles in *Harlow v. Fitzgerald*, 457 U.S. 800 (1982), was uniquely "justified by special policy considerations arising from public officials' exposure to repeated suits," developments since that time make further departures unwise. 504 U.S. at 169, 171. Justice Kennedy wrote:

> I would not extend [the *Harlow*] approach to other contexts. *Harlow* was decided at a time when the standards applicable to summary judgment made it difficult for a defendant to secure summary judgment regarding a factual question such as subjective intent, even when plaintiff bore the burden of proof on the question. . . . However, subsequent clarifications to summary-judgment law alleviated that problem . . . . . Under the principles set forth in *Celotex* [477 U.S. 317 (1986)] and related cases, the strength of factual allegations such as bad faith can be tested at the summary judgment stage.

Id.

Even Judge Nelson's concurring opinion in the instant case notes that "the courts' increasingly benign attitude toward summary judgment proceedings may frequently mean that there will be little practical difference between the good faith defense . . . and . . . qualified immunity." Pet. App. at 22.[3] Thus, the rationale of *Mitchell v. Forsyth*, 472 U.S. 511, 525 (1985), for permitting immediate appeal of a qualified immunity denial — that "qualified immunity is in fact an entitlement not to stand trial in certain circumstances" because trial is typically burdensome — is inapplicable. Where litigation burdens may well be minimal because of the defenses available to a private party defendant, there is no need for this Court's interlocutory review of a qualified immunity denial.

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[3] We do not suggest that the good faith defense will succeed in the present case, where the conduct was so egregious that benign subjective intentions will be difficult to prove. Petitioners would be no less likely to escape the rigors of trial were qualified immunity available to them, however, as their conduct violated clearly established Eighth Amendment rights that a reasonable person would have known about. *Harlow v. Fitzgerald*, 457 U.S. 800 (1982).

CONCLUSION

For the reasons set forth above, the Petition should be denied.

Respectfully submitted,

David C. Vladeck
Counsel of Record
Public Citizen Litigation Group
1600 20th Street, N.W.
Washington, D.C. 20009-1001
(202) 588-1000

Counsel for Respondent[*]

Dated: October 25, 1996

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[*] Counsel wishes to acknowledge the substantial assistance provided by Claudia Polsky, a recent law school graduate.

Supreme Court, U.S.
FILED
JAN 13 1997
CLERK

No. 96-318

In The

Supreme Court of the United States

October Term, 1996

DARYLL RICHARDSON, and JOHN WALKER,

Petitioners,

vs.

RONNIE LEE McKNIGHT,

Respondent.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Sixth Circuit

BRIEF OF PETITIONERS

ROBERT S. CATZ
9 Music Square South
Nashville, Tennessee 37203
(615) 780-3594

CHARLES R. RAY
Counsel of Record
JEFFERY S. FRENSLEY
211 Third Avenue North
Nashville, Tennessee 37201
(615) 256-2111

Counsel for Petitioners

January 13, 1997

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

I. QUESTION PRESENTED

Are private parties serving as quasi-public correctional officers in a privately managed prison facility performing traditional police power functions on behalf of the State of Tennessee, historical powers and functions exclusively reserved to the sovereign that can only be carried out by the State and delegated to their employer, a private for profit corporation as expressly authorized by statute and executed by contract:

1. state actors subject to liability under 42 U.S.C. § 1983 for conduct committed under color of law; and

2. therefore entitled to the defense of qualified immunity in an action for damages brought under 42 U.S.C. § 1983 by a prison inmate in their custodial charge for discretionary acts undertaken while fulfilling their statutorily and contractually defined duties as required by the Tennessee Department of Corrections?

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BRIEF FOR PETITIONERS[1]

II. OPINIONS BELOW

The opinion of the United States Court of Appeals for the Sixth Circuit is reported at 88 F.3d 417 (6th Cir.1996). The opinion of the United States District Court for the Middle District of Tennessee is not reported. Both opinions are reproduced in the Appendix to the Petition for Writ of Certiorari filed herein. (Pet. App. 1-37) The district court's opinion herein incorporates its prior decision denying qualified immunity to private correctional officers employed by the Corrections Corporation of America. *Manis v. Corrections Corporation of America*, 859 F.Supp. 302 (M.D.Tenn.1994) (Higgins, J.).

III. JURISDICTION

The final judgment of the United States Court of Appeals for the Sixth Circuit was entered on July 10, 1996. (Pet. App. 1) The petition for writ of certiorari was filed with this Court within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1). On November 27, 1996 this Court issued an order granting the petition for writ of certiorari to review the final judgment entered by the United States Court of Appeals

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[1] Pursuant to Supreme Court Rule 29.6 petitioners disclose that they are correctional officers employed by the Corrections Corporation of America (CCA) of Nashville, Tennessee. CCA is underwriting petitioners' defense of this action. Thus, a favorable ruling by the Court could end CCA's further expenditure of petitioners' defense.

for the Sixth Circuit denying petitioners qualified immunity. 117 S.Ct. 504.

IV. STATUTORY PROVISIONS INVOLVED

"The Civil Rights Act of 1871," Rev.Stat. § 1979 as amended, 42 U.S.C. § 1983:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.
>
> For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

"The Private Prison Contracting Act of 1986", as amended, T.C.A. § 41-24-101 et seq. is reproduced in the Appendix to the petition for writ of certiorari filed herein. (Pet. App. 50-64)

V. STATEMENT OF THE CASE

The "privatization"[2] of prison facilities has developed as a critical and creative response by government to

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[2] "Privatization" is defined as government reliance on the private sector rather than directly on government agencies for the performance of public functions. The first apparent use of

the exponential problem of institutional overcrowding and the attendant rising costs of providing correctional and other related inmate services traditionally provided by the State as an exclusive public function of the sovereign.

By 1997, at least 22 of the several states had enacted enabling statutory schemes authorizing the state and its political subdivisions to contract with the private sector to provide comprehensive correctional services to inmates confined under the criminal justice system which today is very much a permanent and growing fixture of the governmental and political landscape.[3] In 1986, the

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the term was published in P. Drucker, *THE AGE OF DISCONTINUITY* (1969). E.S. Savas, *Privatization and Prisons*, 40 VAND. L. REV. 889, n.1 (1987). The term has also been broadly defined as the "attainment of any public policy goal through the participation of the private sector." National Commission for Employment Policy, Privatization and Public Employees: The Impact of City and County Contracting Out Government Workers 7 (May 1988). C. Thomas, *Resolving the Problem of Qualified Immunity for Private Defendants in Section 1983 and Bivens Damage Suits*, 53 LA. 449, n.1 (1992). *See generally*, Symposium, *Privatization, the Assumptions and the Implications*, 71 MARQUETTE L. REV. 445 (1988); C. Thomas & L. Hanson, *The Implications of 42 U.S.C. § 1983 for the Privatization of Prisons*, 16 FLA. ST. U.L. REV. 933 (1989).

[3] *See*, ALASKA STAT. § 33.30.031(a) (1995); ARIZ. REV. STAT. § 41-1609.02 (1996); ARK. CODE ANN. § 12-50-106 (1995); COLO. REV. STAT. § 17-27-104 (1996); FLA. STAT. ANN. §§ 957.01-.14 (1995); KAN. STATUTE ANN. § 76-3002 (1995); KY. REV. STAT. ANN. § 197.505(1) (1991); LA. REV. STAT. ANN. § 1800.4(A) (1996); MISS. CODE ANN. § 47-5-1203 (1996); MONT. CODE ANN. § 53-30-106(3); N.C. GEN. STAT. § 148-37(c) (1996); N.M. STAT. ANN. § 33-1-17 (1990); OKLA. STAT. ANN. § 57-504(7) (1996); PA. STATUTES § 61-1084 (1996); S.D. CODIFIED LAWS ANN. § 24-11-39 (1995); TENN. CODE

Tennessee legislature, responding to the need to experiment with alternatives to the exclusive state management and operation of correctional services, enacted enabling legislation entitled "The Private Prison Contracting Act of 1986", T.C.A. § 41-24-101 et seq. The Act specifically authorizes the Tennessee Commissioner of Corrections to enter into formal agreements for the management and operation of correctional facilities and correctional services with private sector prison contractors to state confined inmates placed by the Tennessee criminal courts in the custody and control of the Tennessee Department of Corrections. T.C.A. § 41-24-103.

The preamble of the original Act unambiguously states the experimental nature of the Act and authorizes the Tennessee Commissioner of Corrections:

> [T]o contract with private concerns on a limited basis to afford the opportunity to determine if savings and efficiencies can be effected for the operation of correctional facilities and at the same time insure that the interests of the state citizens and employees can be fully protected.

1986 Tenn. Pub.Acts ch. 932.[4]

ANN. § 41-24-101 (1995); TEX. GOV'T. CODE ANN. § 494.001(a) (1990); UTAH CODE ANN. § 64-13-26 (1993); VA. CODE ANN. § 53.1-262 (1995); W. VA. CODE §§ 25-5-1 to-20 (1995); WIS. STAT. ANN. § 301.08(1)(b) (1991); WYO. STAT. § 7-18-104 (1995).

[4] *See generally*, W. Cody & A. Bennett, *The Privatization of Correctional Institutions: The Tennessee Experience*, 40 VAND. L. REV. 829 (1987). *See also*, I. Robbins, *The Legal Implications of Private Incarceration*, 38 AMER. U. L. REV. 531 (1989).

Under the Tennessee Act "correctional services" are defined broadly to include the following public functions, services and activities within the prison:

> (A) Education, training and job programs;
>
> (B) Recreation, religious and other activities;
>
> (C) Development and implementation assistance for classification, management information systems or services;
>
> (D) Food services, commissary, medical services, transportation, sanitation or other ancillary services;
>
> (E) Counseling, special treatment programs, or other programs for special needs; and
>
> (F) Operation of facilities, including management, custody of inmates, and providing security;

T.C.A. § 41-24-102. (Pet. App. 50)

In 1984, petitioners' employer, the Corrections Corporation of America (CCA), opened its first privately managed adult facility for Hamilton County, in Chattanooga, Tennessee.[5] Today CCA is the largest developer and manager of privatized correctional and detention facilities worldwide. CCA's facilities are located in 11 states and the Commonwealth of Puerto Rico, Australia and the United Kingdom. As of May 30, 1996 CCA had

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[5] *See*, D. Wecht, *Breaking the Code of Deference: Judicial Review of Private Prisons*, 96 YALE L.J. 815, 816-18 (1987) for a brief history of the development of private prisons in England and the United States.

contracts to manage 49 correctional facilities and detention centers with an aggregate design capacity of 33,153 beds in 37 facilities representing 20,994 beds in operation. CCA is currently developing 12 additional facilities and expanding four facilities representing an additional aggregate of 12,159 beds when completed. CCA expects that all of the beds under development will be in operation by the end of 1997. CCA owns 12 of the 37 facilities it currently operates and leases the remaining 25 facilities from governmental agencies and other non-profit corporations.

Throughout the United States there is a growing trend toward privatization of governmental services and functions, including corrections and detention, as government faces continuing pressure to control rising costs and improve the quality of services. According to a 1995 census of private adult correctional facilities the design capacity of quasi-public managed adult correctional and detention facilities worldwide has increased dramatically since CCA opened its first facility in Tennessee in 1984.[6]

The majority of this growth has occurred since 1989 as the number of quasi-publicly managed facilities worldwide increased from 26 facilities to 92 facilities with a design capacity of 63,595 beds in 1995.[7] According to the 1995 census, privately managed facilities are operated

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[6] The census was prepared by the Private Corrections Project, Center for Studies in Criminology and Law, University of Florida, Gainesville, Florida. *Private Adult Correctional Facility Census*, pp. ii-iii (Ninth Edition March 1996).

[7] *Corrections Corporation of America, Annual Prospectus* at 3 (May 31, 1996).

under contract with the Immigration and Naturalization Service and United States Marshall detention facilities as well as state prisons, community correction facilities, intermediate facilities, pre-release centers, work program, work release/halfway facilities privatized by state agencies, county and city jails and transfer and juvenile offender facilities.

Respondent Ronnie Lee McKnight is a state inmate in the custody of the Tennessee Department of Corrections. Following respondent's sentencing to the custody of the Tennessee Department of Corrections respondent was designated to be confined at the South Central Correctional Center (SCCC), Clifton, Tennessee, a facility managed and operated under a contract entered into by the Tennessee Commissioner of Corrections and the Corrections Corporation of America (CCA). (Pet. App. 44-48)

CCA operates several of Tennessee's prisons pursuant to contract and its employees act under the authority of the Private Prison Contracting Act of 1986, T.C.A. § 41-24-101 et seq. *Manis v. Corrections Corporation of America*, 850 F.Supp. 302, 303 (M.D.Tenn.1994). By contract the State of Tennessee has delegated to CCA and its quasi-public correctional officers, historical police powers and traditional public functions exclusively reserved to the sovereign to provide comprehensive correctional services to prisoners sentenced by the Tennessee criminal courts in the custody and confinement of the Tennessee Commissioner of Corrections.[8] The Act expressly prohibits the delegation of specific powers and duties to

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[8] In addition, T.C.A. § 41-24-107(b) provides that the defense of sovereign immunity is unavailable to private

private contractors in the areas of inmate parole, release, work release and furloughs, calculating good time credits, levels of restrictive custody and disciplinary actions. These powers are expressly reserved to the Tennessee Commissioner of Corrections. T.C.A. § 41-24-112.

On March 3, 1994, respondent McKnight filed the instant action for $400,000 in compensatory and punitive damages under 42 U.S.C. § 1983 in the United States District Court for the Middle District of Tennessee against John Rees,[9] the warden of the South Central Correctional Center (SCCC) and two of its correctional officers, Daryll Richardson and John Walker. *McKnight v. Rees*, No. 1-94-0042 (M.D.Tenn.) (Pet. App. 23-37).

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contractors. The issue of state sovereign immunity is a matter of Tennessee law and is not before the Court. These petitioners claim the availability of the defense of qualified immunity which is entirely a matter of federal law under 42 U.S.C. § 1983. *Martinez v. California*, 444 U.S. 277, 284 n.8 (1980) (state sovereign immunity is not applicable to § 1983 action in state court); *Felder v. Casey*, 487 U.S. 131 (1988) (§ 1983 action preempts state immunity law). *See also* S. Steinglass, *The Emerging State Court § 1983 Action: A Procedural Review*, 38 U. Miami L. Rev. 381, 475 (1984); S. Steinglass, *Section 1983 Litigation in State Courts* § 15.2(b), § 15.3 (Clark Boardman 1987). Even in the absence of this statutory provision it is doubtful under any legal theory that private contractors such as CCA, could ever claim a sovereign immunity defense under either Tennessee or federal law. *See Owen v. City of Independence*, 445 U.S. 622 (1980) (municipal corporations not entitled to immunity defense even when municipal official acted in good faith).

[9] Warden John Rees was subsequently dismissed from the case. Respondent McKnight did not appeal the dismissal. (Pet. App. 2) Accordingly, Warden Rees is not before the Court.

Respondent's complaint alleges that his right to be free from cruel and unusual punishment under the Eighth Amendment of the United States Constitution was violated when he was subjected to excessively tight restraints which caused him severe bodily injury during his transport on September 13, 1993 from the Tennessee Reception Center, Nashville, Tennessee to SCCC, Clifton, Tennessee. The complaint alleges that the restraints caused him extreme pain and swelling which resulted in his hospitalization. It is further alleged that when he complained to petitioners Richardson and Walker about the restraints, his pleas were deliberately ignored, and that he was taunted by them and that said conduct of the officers amounted to deliberate indifference of his medical needs, rights arising under the Eighth Amendment. (Pet. App. 44-48); *Estelle v. Gamble*, 429 U.S. 97 (1976); *Farmer v. Brennan*, 511 U.S. 825 (1994).

On December 2, 1994 petitioners filed a motion to dismiss respondent's complaint asserting that as private persons acting under color of law and performing exclusive public functions as correctional officers delegated to their employer CCA by the Tennessee Department of Corrections by contractual agreement, they were entitled to the defense of qualified immunity in the same manner as their state employed counterparts as recognized by this Court in *Procunier v. Navarette*, 434 U.S. 555, 561-62 (1978). (Pet. App. 3)

On March 1, 1995, the district court denied the motion to dismiss, holding that petitioners Richardson and Walker, private persons employed as quasi-public correctional officers by a private, for profit corporation were not entitled to avail themselves of the defense of

qualified immunity. (Pet. App. 23-24) The district court relied on its previous decision in *Manis v. Corrections Corporation of America*, 859 F.Supp. 302 (M.D.Tenn.1994) (Higgins, J.).

On March 6, 1995, petitioners filed a timely interlocutory appeal to the United States Court of Appeals for the Sixth Circuit as provided under *Mitchell v. Forsyth*, 472 U.S. 511 (1985); *Johnson v. Jones*, 115 S.Ct. 2151, 2156 (1995); *Behrens v. Pelletier*, 116 S.Ct. 834 (1996). (Pet. App. 2) The jurisdiction of the court of appeals was invoked under 28 U.S.C. § 1291.

On July 10, 1996, the Sixth Circuit affirmed the district court's denial of petitioners' motion to dismiss the respondent's complaint, holding that the defense of qualified immunity was unavailable to private persons acting under color of law under this Court's decision in *Wyatt v. Cole*, 504 U.S. 158 (1992). (Pet. App. 7-8)

On August 26, 1996, petitioners filed a timely petition for writ of certiorari with this Court. On November 27, 1996, the Court granted the petition for writ of certiorari. 117 S.Ct. 504.

VI. SUMMARY OF THE ARGUMENT

Private parties acting as quasi-public correctional officers under government contract, performing essential traditional and *exclusive* public functions that can only be carried out by the sovereign and therefore reserved to the State, on behalf of and for the benefit of the State, vital services that require the exercise of discretion, to prison inmates placed in their custodial charge satisfy the state

action requirement of the Fourteenth Amendment and such conduct constitutes action under color of law under 42 U.S.C. § 1983. *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345 (1974); *West v. Atkins*, 487 U.S. 42 (1988); *Lugar v. Edmondson Oil Co.*, 457 U.S. 922 (1982).

Qualified immunity advances the effective performance of vital and necessary governmental functions. It is no concern whether the governmental functions actually performed are undertaken by public officials or by private sector parties acting under contractually delegated authority on behalf of the sovereign as quasi-public correctional officers exercising custodial authority over state prisoners entrusted to their charge by the State. *West v. Atkins*, 487 U.S. 42 (1988).

Just as qualified immunity protects federal and state employed correctional officials from vexatious litigation and promotes the effective administration of vital law enforcement and correctional functions by promoting the exercise of discretion by governmental officials and reducing the societal costs of litigation, the extension of qualified immunity to quasi-public correctional service providers advances the same public interest objectives necessary for the proper, effective and just administration of core and vital governmental powers and functions. Thus upon sifting the facts and weighing the unique and particular circumstances presented in this case by applying historic public function analysis, the Court must inevitably conclude that qualified immunity should be afforded to quasi-public correctional officers to the same extent enjoyed by their federal and state employed professional counterparts. *Procunier v. Navarette*, 434 U.S. 555 (1978); *Cleavinger v. Saxner*, 474 U.S. 193 (1985).

VII. ARGUMENT

I.

PRIVATE STATE ACTORS SERVING AS QUASI-PUBLIC CORRECTIONAL OFFICERS IN A PRIVATELY MANAGED PRISON FACILITY PERFORMING TRADITIONAL AND HISTORICAL POLICE POWER FUNCTIONS UNDER COLOR OF LAW ON BEHALF OF THE STATE OF TENNESSEE, UNIQUE FUNCTIONS AND POWERS EXCLUSIVELY AND UNIQUELY RESERVED TO THE SOVEREIGN AS EXPRESSLY DELEGATED TO THEIR PRIVATE EMPLOYER BY CONTRACT AS AUTHORIZED BY STATE LAW, ARE ENTITLED TO ASSERT THE DEFENSE OF QUALIFIED IMMUNITY IN AN ACTION FOR DAMAGES BROUGHT UNDER 42 U.S.C. § 1983 BY A PRISON INMATE PLACED IN THEIR CUSTODIAL CHARGE FOR DISCRETIONARY ACTS UNDERTAKEN WHILE FULFILLING THEIR STATUTORILY AND CONTRACTUALLY DEFINED DUTIES

This case raises an important fundamental and core question of federal law regarding the availability of the qualified immunity defense in litigation arising under 42 U.S.C. § 1983. This action for damages is brought by a prison inmate in the custodial charge of quasi-public[10]

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[10] The term "quasi" in legal phraseology applies when one subject resembles another with which it is compared, but there exists intrinsic and material differences between them. *BLACKS' LAW DICTIONARY* at 1245 (Sixth Edition 1990). "Quasi-public official" refers to private actors who as agents of the state owe a fiduciary duty of trust to the public even though they may also serve private interests. *See*, e.g., *Rojas v. Alexander's Department Stores*, 924 F.2d 406, 408 (2d Cir.1990) (private security guard employed by department store with arrest powers over

correctional officers acting under color of Tennessee law while engaged in the performance of exclusive and traditional governmental police power functions of detention of Tennessee prisoners, acting in their official capacity as employees of the Corrections Corporation of America (CCA),[11] and functions expressly authorized by a comprehensive Tennessee statutory scheme and delegated by the State to their employer by a correctional services contract entered into with the Tennessee Department of Corrections.[12]

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shoplifters authorized under state statute is a "quasi-public police officer" acting under color of law and subject to liability under 42 U.S.C. § 1983). *See also Jackson v. Pantazes*, 810 F.2d 426 (5th Cir.1987) (bail bondsmen effectuating an arrest as authorized under state law acts under color of law); *Warner v. Grand County*, 57 F.3d 962, 964 (10th Cir.1995) (female director of private crisis center that performed strip search at behest of law enforcement officer referred to as "auxiliary" police officer acting under color of law). Cf. *Landry v. A-Able Bonding Inc.*, 75 F.3d 200, 204-05 (1996) (Bounty hunter does not act under color of law); *Ouzts v. Maryland National Insurance Co.*, 505 F.2d 547 (9th Cir.1974) (en banc) (same).

[11] CCA headquartered in Nashville, Tennessee manages correctional facilities in Arizona, Colorado, Florida, Indiana, Kansas, Louisiana, Mississippi, New Mexico, Oklahoma, Puerto Rico, Tennessee and Texas. CORRECTIONS CORPORATION OF AMERICA, 1995 ANNUAL REPORT at 14-15.

[12] T.C.A. § 41-24-110 prohibits the delegation of authority to private contractors on matters related to the control and custody of inmates. The Attorney General of Tennessee has noted that "control and custody" is an exclusive power reserved to the State that cannot be delegated by contract. However "control and custody" does not require the State to administer, manage and operate the daily operation of a correctional facility. Tenn. Att'y Gen. Opin. No. 85-286 (1985).

A. 42 U.S.C. § 1983: State Action and Color of Law Requirement

The Civil Rights Act of 1871, Rev. Stat. § 1979 as amended, 42 U.S.C. § 1983 creates a statutory cause of action against "every person who, under color of any statute . . . of any State" deprives another of "rights, privileges, or immunities secured by the Constitution and laws. . . . " By fashioning a federally created right, Congress gave enforcement content to the recently enacted Fourteenth Amendment and its dual command of equal protection and due process. The purpose of the Act was to deter public officials from using the cloak of state authority to deprive individuals of their federally protected constitutional rights and to provide compensation and other relief to victims of constitutional torts whenever such deterrence fails. *Wyatt v. Cole*, 504 U.S. 158, 161 (1992); *Carey v. Piphus*, 435 U.S. 247, 254-57 (1978); *Monroe v. Pape*, 365 U.S. 167, 180 (1961).

As a threshold matter, in order for petitioners to be entitled to assert a qualified immunity defense it must initially be determined whether their conduct can be fairly attributed to the State of Tennessee making them state actors and that in doing so they acted under color of law for violation of rights secured under 42 U.S.C. § 1983. *Siegert v. Gilley*, 500 U.S. 226, 232 (1991). Whether the alleged misconduct of these quasi-public correctional officers constitutes state action may only be determined "by sifting facts and weighing circumstances [so] the nonobvious involvement of the state in private conduct be attributed its true significance." *Burton v. Wilmington Park Authority*, 365 U.S. 715, 722 (1961). Such

assessment will necessarily require a "particularized inquiry into the circumstances of each case in order to determine whether a given factual situation falls within the variety of individual-state relationship which the Fourteenth Amendment was designed to embrace." *Jackson v. Metropolitan Edison Company*, 419 U.S. 345, 359-360 (1974). Only a defendant acting under color of law may violate 42 U.S.C. § 1983 if exercising powers *"traditionally exclusively reserved to the State." Id.* at 362. (Emphasis added)

In order for this Court to find the requisite presence of state action, two general requirements must be established. First, the alleged deprivations of rights "must have been caused by the exercise of some right or privilege created by the state by a rule of conduct imposed by the state or by a person for whom the state is responsible." *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 937 (1982). Second, the defendant "must fairly be said to be a state actor." *Id.* In *Lugar* the Court held that conduct that is considered state action also constitutes action under color of law under 42 U.S.C. § 1983.[13] *Id.* at 935.

Thus, whenever a party invokes a statute and obtains enforcement thereof from a public official, he participates in state action and acts under color of the statute relied upon. *Id.* at 934. Furthermore, the Court's state action decision in *Tulsa Professional Collection Services, Inc. v. Pope*, 485 U.S. 478 (1988) supports the rationale that *Lugar*

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[13] The Court held as early as *Monroe v. Pape*, 365 U.S. 167 (1961) that 42 U.S.C. § 1983 "should be read against the background of tort liability that makes a man responsible for the natural consequences of his actions." *Id.* at 187.

is not solely limited to prejudgment attachment. Under *Pope*, "when private parties make use of state procedures with overt, significant assistance of state officials, state action may be found." *Id*. 485.

Prior decisions of this Court establish that state action is present whenever government delegates to the private sector functions and powers that historically and traditionally have been governmental in nature. Thus, there must be an exercise of power delegated to a defendant by the state "which is traditionally associated with sovereignty, such as eminent domain." *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345, 352-353 (1974) (§ 1983 claim against private utility company rejected as provision of electricity not "traditionally exclusively reserved to the State"); *Moose Lodge No. 107 v. Irvis*, 407 U.S. 163, 176-77 (1972) (state action is present when it can be said that State and private actor in realistic sense engage in joint venture or partnership).

In *West v. Atkins*, 487 U.S. 42 (1988) the Court, in an unanimous decision held that a medical physician contractually engaged by the state to provide medical care and treatment to prison inmates constitutes state action. That the physician was not a state employee, but rather rendered professional services under a personal service contract was of no consequence as the physician's conduct in treating North Carolina state prison inmates was "fairly attributed to the State," *United States v. Classic*, 313 U.S. 299, 326 (1941); *Monroe v. Pape*, 365 U.S. 167, 187 (1961), and thus was a "person who may fairly be said is a state actor" and his conduct was "chargeable to the State." *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 937, 941 (1982).

It is the physician's *function* within the state system, *not* the precise terms of his employment, that determines whether his actions can be fairly attributed to the State. Whether a physician is on the state payroll or is paid by contract, the dispositive issue concerns the relationship among the State, the physician, and the prisoner. Contracting out prison medical care does not relieve the State of its constitutional duty to provide adequate medical treatment to those in custody, and it does not deprive the State's prisoners of the means to vindicate their Eighth Amendment rights. The State bore an affirmative obligation to provide adequate medical care to West; the State delegated that function to respondent Atkins; and respondent voluntarily assumed that obligation by contract.

West v. Atkins, supra, at 55-56. (Emphasis added)

It is clear from the Court's analysis in *West* that it was of no legally significant consequence that the physician did not perform professional services exclusively for the state. "It is the physician's *function* while working for the State, not the amount of time he spends in performance of those duties or the fact that he may be employed by others to perform similar duties, that determines whether he is acting under color of state law." *Id* at 55. This is so because it is the State that has a constitutional obligation to provide prisoners in its charge with adequate medical care as inmates can only rely on the State to provide for their medical needs. *Estelle v. Gamble*, 429 U.S. 97, 103 (1976). Thus, once the government entrusts one of its traditional and exclusive governmental public functions to a private person, the private actor's conduct will be treated as state action thereby subjecting the private

party to liability under 42 U.S.C. § 1983. In contrast, the mere significance of the governmental function that is undertaken by private actors is not enough upon which to find state action. In order for state action to be found, the function performed must be historically, uniquely and exclusively governmental in nature. *Rendall-Baker v. Kohn*, 457 U.S. 830, 841 (1982) (acts of private contractors performing educational functions on behalf of state, not exclusive and do not become acts attributed to the state even by reason of their significance). *See also, NCAA v. Tarkanian*, 488 U.S. 179, 195-96 (1988) (state university's adoption of private NCAA regulations did not render NCAA as state actor); *San Francisco Arts Athletics v. U.S. Olympic Committee*, 483 U.S. 522, 547 (1987) (insufficient nexus between federal government and USOC's refusal to permit nonprofit association to use the word "Olympic"); *Blum v. Yaretsy*, 457 U.S. 991, 1004-05 (1982) (mere approval or acquiescence to the initiatives of private parties insufficient to justify finding of state action). Cf. *Flagg Brothers Inc. v. Brooks*, 436 U.S. 149, 172 n.8 (1978) (Stevens, J. dissenting) (maintenance of police force a uniquely governmental function and delegation of police power to private party entails state action). Thus, liability under 42 U.S.C. § 1983 cannot be avoided simply because the unique and exclusive public function is privatized away by contract to a private actor.

Finally, as Tennessee law permits private corporations to own, operate and manage self-contained private prison communities, and not unlike any "company town" that eschews the fundamental rights of its inhabitants, state action will be present under classic public function analysis. *Marsh v. Alabama*, 326 U.S. 501, 509 (1946) (state

law which permits private ownership of "company town" to prevent distributing literature to migrant farmworkers under state trespass law violates first and fourteenth amendments); *Illinois Migrant Council v. Campbell Soup*, 519 F.2d 391 (7th Cir.1975); *Petersen v. Talisman Sugar Corp.*, 478 F.2d 73 (5th Cir.1973). State action is present as these quasi-public correctional officers are "private individuals . . . endowed by the State with powers or functions governmental in nature, . . . they become agencies of the state and subject to its constitutional limitations." *Evans v. Newton*, 382 U.S. 296, 299 (1966).

In sum, by "sifting the facts and weighing the [unique and particular] circumstances" of this case it is apparent that state action is present under a public function analysis and that the petitioners acted under color of law. These petitioners, quasi-public correctional officers, provide even greater traditional correctional functions than the state contracted prison physician in *West*. The State has delegated vital correctional services to them which as sovereign it is required to provide to inmates under its ultimate dominion, control, oversight, regulation and power of state authority.[14] By enactment of the

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[14] T.C.A. § 41-24-102 (Pet. App. 50) provides that correctional services include classification of inmates, education, training, recreational and religious activities, food services, medical services, counseling, special treatment programs, custody of inmates and security. Under T.C.A. § 41-24-111 (Pet. App. 59-60) all existing provisions of Tennessee law governing prisons shall apply to privately managed facilities. Under T.C.A. § 41-24-109 (Pet. App. 59) the Tennessee Commissioner of Corrections monitors privately managed prisons to ensure compliance with state and federal law as well as oversight by the Tennessee legislature.

"Private Prison Contracting Act of 1986" T.C.A. § 41-24-101 et seq., the State of Tennessee has by contract clothed and entrusted these petitioners, quasi-public officials,[15] and their employer the Corrections Corporation of America, as agents of the State with broad delegated powers uniquely and exclusively the function of the sovereign that can only be carried out by the State.

B. Public Policy: Constitutional Torts and Qualified Immunity

The modern immunity decisions of this Court begin with *Tenney v. Brandlove*, 341 U.S. 367 (1951). In *Tenney* the Court considered for the first time whether a state legislator could assert absolute immunity from suit arising under 42 U.S.C. § 1983. The Court held that legislators where entitled to immunity from civil damage actions as the common law clearly recognized the privilege to be free of liability when acting "in the sphere of legitimate legislative activity." *Id.* at 376.

In *Pierson v. Ray*, 386 U.S. 547 (1967), the Court held that law enforcement officers are entitled to qualified immunity from suit even when they act pursuant to a statute subsequently held unconstitutional. The Court provided law enforcement officers qualified immunity just as the defense of good faith and probable cause was

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[15] The Tennessee courts have long-recognized the status of a "quasi-public official". *Mayes v. Bailey*, 352 S.W.2d 220, 223 (Tenn.1961); *McKenna v. Sumner County Bd. of Education*, 574 S.W.2d 527, 531 (Tenn.1978).

available to police officers in a common law action for false arrest and imprisonment. *Id.* at 555-57.

In *Scheur v. Rhodes*, 416 U.S. 232 (1974), the Court in recognizing qualified immunity for an Ohio governor and other state officials set forth the rationale for the common law immunity doctrine:

> 1) the injustice, particularly in the absence of bad faith, of subjecting to liability an officer who is required, by the legal obligations of his position, to exercise discretion; 2) the danger that the threat of such liability would deter his willingness to execute his office with decisiveness and the judgment required by the public good.

Id. at 240.

Following *Scheur* subsequent decisions of this Court emphasize that the public interest would be harmed if officials are deterred from the effective performance of core and vital state public functions to the threat of personal liability under 42 U.S.C. § 1983. These decisions uniformly establish that public officials performing vital discretionary executive and administrative functions enjoy qualified immunity from personal liability in the performance of their duties. *Wood v. Strickland*, 420 U.S. 308 (1975) (public school officials); *O'Connor v. Donaldson*, 422 U.S. 563 (1975) (state mental health administrators); *Davis v. Scherer*, 468 U.S. 183 (1984) (state highway officials) and of particular significance here state and federal prison officials. *Procunier v. Navarette*, 434 U.S. 555 (1978); *Cleavinger v. Saxner*, 474 U.S. 193 (1985).

Finally, in *Harlow v. Fitzgerald*, 457 U.S. 800, 814 (1982), the Court amplified on the public policy considerations underlying the doctrine of qualified immunity.

> [I]t cannot be disputed seriously that [1983] claims frequently run against the innocent as well as the guilty at a cost not only to the defendant officials, but to society as a whole. These costs include the expense of litigation, the diversion of official energy from pressing public issues and the deterrence of able citizens from acceptance of public office.

Under *Harlow*, resolution of immunity questions necessarily "requires a balance between the evils inevitable in any available alternative." In cases which allege abuse of power by a public officer "an action for damages may offer the only realistic avenue for vindication of constitutional guarantees." *Id.* at 813-14.

When determining whether a particular public official should be afforded qualified immunity, this Court has consistently adopted a functional approach to the immunity question. The Court noted that immunity from suit is not simply awarded to one holding public office but rather derives from the performance of important core governmental functions. *Harlow*, at 812-813. In order for a state actor to claim an immunity from 1983 liability one must demonstrate that "the responsibilities of his office embraced a function so vital as to warrant immunity at common law" and that "he was discharging the protected function when performing the act for which liability is

asserted."[16] *Id.* Thus any public official acting in the course of official duties that require the exercise of significant discretionary powers and vital functions attendant to the performance of executive and administrative responsibilities are afforded qualified immunity from suit under 42 U.S.C. § 1983. Ultimately any justification for recognizing immunity turns on the "*functions* it protects and serves, not by the persons to whom it attaches." *Forrester v. White*, 484 U.S. 219, 224 (1988). (Emphasis added).

In sum, once a public official adequately demonstrates that he has acted out a significant discretionary executive or administrative function related to the alleged deprivation qualified immunity should attach for this Court has "been unwilling to complicate qualified immunity analysis by making the scope or extent of immunity turn on the precise nature of various duties or the precise character of the particular rights alleged to have been violated." *Anderson v. Creighton*, 483 U.S. 635, 643 (1987). *Anderson* eliminates the need to compare the degree of qualified immunity to be afforded a public official to the amount of discretionary power exercised by that individual.

Ultimately, qualified immunity seeks to reconcile and balance important and competing societal interests. One is the public interest as embodied by congressional policy in 42 U.S.C. § 1983 to compensate victims for violation of federally protected rights at the hand of abusive public

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[16] The Court has held that qualified immunity is an affirmative defense and the burden of pleading it rests with the defendant. *Gomez v. Toledo*, 446 U.S. 635, 640 (1980).

officials. *Harlow v. Fitzgerald*, 457 U.S. 800, 814 (1982) (when government officials abuse their office damage actions may be the only realistic avenue for vindication of constitutional guarantees). The other is the compelling interest of limiting litigation against public officials that entail social costs that the fear and exposure to personal liability and vexatious and insubstantial civil rights litigation will unduly inhibit officials from serving or cause them to be unwilling to perform their public responsibilities with the decisiveness and the judgment required by the public function. *Scheur v. Rhodes*, 416 U.S. 232, 240 (1974); *Harlow v. Fitzgerald*, 457 U.S. 800, 814 (1982); *Anderson v. Creighton*, 483 U.S. 635, 645 (1987).

C. Qualified Immunity is Available to Quasi-Public Correctional Officers Performing Historical and Traditional Police Power Functions Exclusively Reserved to the Sovereign and Delegated to Private State Actors Under State Law and Contract

1. *Wyatt v. Cole* and Qualified Immunity

In *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 942 (1982), the Court held that a private party initiating state attachment procedures later successfully challenged as unconstitutional, acts under color of state law and is liable for the deprivation of property under 42 U.S.C. § 1983. However, in a footnote, the Court expressly declined to "reach the question of the availability of [qualified immunity] to private individuals at this juncture." *Id.* at 942 n.23. That issue was finally decided by the Court in a narrowly confined decision in *Wyatt v. Cole*, 504 U.S. 158 (1992).

In *Wyatt*, the Court considered the qualified immunity issue left open in *Lugar*; "whether private defendants charged with 42 U.S.C. § 1983 violations are entitled to qualified immunity from suit." *Id.* at 159. In *Wyatt*, the Court noted:

> The question on which we granted certiorari is *a very narrow one*: "[W]hether private persons, who conspire with state officials to violate constitutional rights, have available to them the good faith immunity applicable to public officials." The precise issue encompassed in this question, and the *only* issue decided by the lower courts, is whether qualified immunity, . . . is available for private defendants invoking a state replevin, garnishment or attachment statute.

Id. at 168. (Emphasis added)

In *Wyatt*, the Court answered the question when it held that qualified immunity is not available to defendants acting purely as private parties for personal gain invoking unconstitutional statutory seizure remedies. *Id.* 168-169. In reaching its conclusion the Court noted "that the rationales mandating qualified immunity for public officials are not applicable to private parties." *Id.* at 167. In so holding the Court noted:

> Unlike school board members, or police officers, or Presidential aides, private parties hold no office requiring them to exercise discretion; nor are they principally concerned with enhancing the public good. Accordingly extending qualified immunity to private parties would have no bearing on whether public officials are able to act forcefully and decisively in their jobs

> or whether qualified applicants enter public service. Moreover, unlike with government officials performing discretionary functions they will not be unduly impaired if private individuals are required to proceed to trial to resolve their legal disputes. In short, the nexus between private parties and the historic purposes of qualified immunity is simply too attenuated to justify such an extension of our doctrine of immunity.

Id. at 168. (Citations omitted)

With respect to the unavailability of qualified immunity to purely private persons that perform no discretionary function for the public good the Court reasoned that there was no common law immunity that Congress intended to include under 42 U.S.C. § 1983, as the most analogous torts at common law recognized actions arising for abuse of process against private parties. Even if at common law such actions could be defeated by demonstrating that the defendants had acted without malice and with probable cause, and even if such rationale supported a good faith defense under 42 U.S.C. § 1983, such a rationale would not entitle private defendants to an objectively determined qualified immunity standard under *Harlow v. Fitzgerald*, 457 U.S. 800 (1982), immediately appealable under *Mitchell v. Forsyth*, 472 U.S. 511, 528-30 (1985).

In sum, the reason for according objectively determinable qualified immunity to public officers is based not only on the existence of a good faith defense at common law, but also for special and unique public policy considerations implicated in suing public officials where qualified immunity acts to safeguard and relieve public

servants from vexatious litigation, and thereby promoting and furthering the public interest. In *Wyatt*, while recognizing that principles of fairness and equity might offer some protection to private citizens who rely unsuspectingly on state laws that they had no reason to believe are invalid, the Court nonetheless held that the nexus between private parties and the historical purposes of qualified immunity was too attenuated to justify such an extension of the doctrine. The Court noted that such an extension would have no bearing on whether public officials were able to act forcibly or decisively in their official duties, or on whether public officials would be deterred from entering public service. Since private litigants hold no office requiring the exercise of discretionary functions, they are not principally concerned with furthering the public good, and the public interest would not be impaired if private litigants were compelled to proceed to trial to resolve their legal controversies. *Wyatt, supra* at 167-169.

2. Post-Wyatt Lower Court Decisions

Since this Court's 1992 decision in *Wyatt*, the First, Seventh, Tenth and Eleventh Circuits have construed this Court's holding narrowly, limiting its application to the "precise issue" that qualified immunity is not available as a defense in cases where private parties act under color of law in pursuit of their own narrow private interests unrelated to the performance of a governmental function. In contrast, the Sixth Circuit rejected this approach and read *Wyatt* as creating a broad per se rule that *"private parties*

are not eligible for immunity from suit." 88 F.3d at 421. (Pet. App. 21) (Emphasis added)

The circuits in conflict with the Sixth Circuit draw factual and policy distinctions in two categories of cases when resolving whether a private defendant acting under color of law should enjoy the availability of a qualified immunity defense under 42 U.S.C. § 1983. Thus, private parties acting under color of law and fulfilling a traditional governmental discretionary function at the behest of the sovereign either under contract, agreement, grant or pursuant to a court mandated order are entitled to assert a qualified immunity defense otherwise recognized as available to public officers acting in a similar capacity. *Rodriques v. Furtado*, 950 F.2d 805, 815 (1st Cir.1991) (private physician who performed vaginal cavity search pursuant to valid search warrant entitled to qualified immunity); *Frazier v. Bailey*, 957 F.2d 920, 928-929 (1st Cir.1992) (private social workers who contracted with state to provide statutorily required counseling and investigative services of child abuse are entitled to qualified immunity); *Sherman v. Four County Counseling Center*, 987 F.2d 387, 405-406 (7th Cir.1993) (qualified immunity applies to private medical institution involved in emergency court ordered involuntary detention and treatment of plaintiff); *Leeks v. Cunningham*, 997 F.2d 1330, 1333 (11th Cir.), *cert. denied*, 510 U.S. 1014 (1993) (private physician under contract to provide medical services to county jail entitled to qualified immunity); *Williams v. O'Leary*, 55 F.3d 320, 323-24 (7th Cir.), *cert. denied*, 116 S.Ct. 527 (1995) (physician whose private employer held state contract to provide medical care to state prison system entitled to qualified immunity); *Warner v. Grand*

County, 57 F.3d 962, 966 (10th Cir.1995) (private crisis center director conducting strip search at police officer's request entitled to qualified immunity); *Eagon v. Elk City*, 72 F.3d 1480, 1489 (10th Cir.1996) (private person charged with power pursuant to city council resolution to grant or deny applications for Christmas displays in city park entitled to qualified immunity).

On the other hand, private parties acting under color of law for purely private financial gain or solely for narrow self-interest as in *Wyatt*, entirely unrelated to the performance of a traditional public function, are not entitled to qualified immunity. *Burrell v. Board of Trustees of Ga. Military College*, 970 F.2d 785, 787 (11th Cir.1992), *cert. denied*, 507 U.S. 1018 (1993) (private defendants acting in concert with public officials of military college to terminate plaintiff's employment because of husband's public criticism of institution not entitled to qualified immunity); *Howerton v. Gabica*, 708 F.2d 380, 385 n.2 (9th Cir.1983) (private landlord who enlisted services of police officers to assist in unlawful eviction not entitled to qualified immunity); *Felix de Santana v. Velez*, 956 F.2d 16, 20 (1st Cir.), *cert. denied*, 506 U.S. 817 (1992) (private party who conspired with prosecuting attorney to indict a coworker for perjury not entitled to qualified immunity); *Vector Research, Inc. v. Howard & Howard Attorneys, P.C.*, 76 F.3d 692, 698-99 (6th Cir.1996) (private attorneys assisting law enforcement in unlawful search and seizure not entitled to qualified immunity).

In rejecting the availability of the defense of qualified immunity to petitioners Richardson and Walker, quasi-public correctional officers employed by CCA under state contract authorized by the Tennessee Commissioner of

Corrections, the Sixth Circuit offered the following policy rationale which conflicts with the several circuits that have construed *Wyatt* narrowly by limiting this Court's holding only to those factual circumstances where a private person acts under color of law to promote an exclusive private interest:

> The public undoubtedly has an interest in maintaining secure and efficient correctional facilities. . . . Suffice it to say that it is beyond peradventure that correctional officers working for a private, for-profit corporation that has contracted with the state are serving a public interest by operating Tennessee's prison facilities.
>
> * * *
>
> Nonetheless, we also recognize that, while privately employed correctional officers are serving the public interest by maintaining a correctional facility, they are not motivated by a desire to further the interests of the public at large. Rather, as employees of a private corporation seeking to maximize profits, correctional officers act, at least in part, out of a desire to maintain the profitability of the corporation for whom they labor, thereby insuring there own job security. While this arguably did not vitiate furtherance of the public interest, it upsets the balance qualified immunity seeks to establish "between compensating those who have been injured by official conduct and protecting government's ability to perform its traditional public functions." *Wyatt*, 504 U.S. at 167. The balance struck by qualified immunity, at least implicitly contemplates a government actor

> acting for the good of the state, not a private actor for the good of the pocketbook.

88 F.3d at 424-25, (Pet. App. 15-16).

The Sixth Circuit's decision, admittedly relies on an "implicitly" broad reading of *Wyatt* which is unreasonable and is clearly in conflict with applicable decisions of the First, Seventh, Tenth and Eleventh Circuits which have considered the precise question presented herein. Circuit Judge Nelson, in his separate opinion concurring in the judgment, noted that he was constrained by binding Sixth Circuit precedent from holding that petitioners were entitled to qualified immunity, which has adopted a per se rule *"that private parties are not eligible for immunity from suit."* *Duncan v. Peck*, 844 F.2d 1261, 1264 (6th Cir.1988); *Vector Research, Inc. v. Howard & Howard, P.C.*, 76 F.3d 692, 698-99 (6th Cir.1996):

> If I believed that we were free to dispose of this appeal on public policy grounds, my vote would be to remand the case with instructions to dismiss. . . . The notion that there is likely to be a meaningful difference between the behavior of a correctional officer whose paycheck comes from the State of Tennessee and the behavior of a correctional officer whose paycheck comes from the Corrections Corporation of America is a notion, it seems to me, that bespeaks a vaguely utopian view of the virtues of those that feed at the public trough. This view is not one I share. If it is sound public policy to offer qualified immunity from suit to correctional officers employed by a public corporation, I think it is equally sound policy to offer qualified immunity to the officer employed by a private corporation, assuming both employees

> perform identical public functions. . . . In the post-*Wyatt* era, I imagine, most of our sister circuits will probably continue to make qualified immunity available to private defendants who perform governmental functions for governmental purpose. . . . Given *Duncan*, however, I do not believe the qualified immunity option is currently open to our panel. . . . *This holding may be too broad*, but our circuit precedent rule makes it binding on us here.

88 F.3d at 425-26. (Pet. App. 19-22) (Emphasis added)

3. Availability of Qualified Immunity to Quasi-Public Officials After *Wyatt*

In *Procunier v. Navarette*, 434 U.S. 555, 561-562 (1978) the Court, without reference to any common law inquiry, based its decision that state correctional officers are entitled to qualified immunity solely on public policy considerations. Historically, the Court justified the extension of immunity to a particular public official by looking to the common law existing at the time of the passage of the Civil Rights Act of 1871, in addition to public policy considerations relevant to the particular function performed by the public officeholder. *City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 259 (1981).

Thus prior to *Procunier* the immunity decisions of the Court were "predicated upon a considered inquiry into the immunity historically accorded the relevant official at common law and the [public policy] interests behind it." *Imbler v. Pachtman*, 424 U.S. 409, 421 (1976). In *Procunier* Justice Stevens noted in dissent that he had no "quarrel with the extension of qualified immunity to all state

agents," and concluded that a "considered inquiry" into the common law has "now been abandoned" by the Court. *Id.* at 568-569. Justice Steven's observation regarding the abandonment of a common law analysis is supported by Justice Scalia's conclusion that the Court has "completely reformulated qualified immunity along principles not at all embodied in the common law." *Anderson v. Creighton*, 483 U.S. 635, 645 (1987). Thus this Court needs no considered common law inquiry for granting qualified immunity to these quasi-public correctional officers as it now is clear from decisions of this Court that all public officials that perform vital discretionary governmental functions enjoy qualified immunity from suit. *See also, Heck v. Humphrey*, 512 U.S. 477, 495-506 (1994) (Souter, J. joined by Blackmun, Stevens and O'Connor, JJ. concurring in the judgment) (discussing import of common law analysis in § 1983 claims).

Yet even if a common law inquiry is required then it is clear that correctional officers possess broad police power functions under Tennessee law[17] of custodial

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[17] T.C.A. § 4-3-609 (Exercise of police powers by correctional officers):

(a) Those employees of the department of correction as the commissioner shall designate who have been trained in the use of firearms are vested with the powers and authority of peace officers, including the power to carry weapons, and shall exercise such powers and authority only: (1) While on the grounds of the institutions under the supervision of the department; (2) While transporting inmates between institutions; (3) While pursing escapees from such institutions; or (4) While aiding local law enforcement officials in the search and apprehension of escapees.

detention, security, physical restraint and search and seizure as exercised by other peace officers that historically enjoyed qualified immunity at common law. *Pierson v. Ray*, 386 U.S. 547, 555-57 (1967) (defense of good faith and probable cause which is available to police officers in common law action for false arrest and imprisonment is also available under § 1983). These law enforcement powers and functions of prison officials are well known to the Court.

> Prison administrators are responsible for maintaining internal order and discipline, for securing their institutions against unauthorized access or escape, and for rehabilitating, to the extent that human nature and inadequate resources allow, the inmates placed in their custody, the Herculean obstacles to effective discharge of these duties are too apparent to warrant explication.

Procunier v. Martinez, 416 U.S. 396, 404-05 (1974).

In *West v. Atkins*, 487 U.S. 42, 55-56 (1988) the Court held that a contract physician providing medical care and treatment to prisoners within the state correctional system acted under color of law as the functions performed by the physician and not the precise terms of employment determines whether actions of the defendant can be fairly attributed to the state. Although the qualified immunity issue was not before the Court in *West*, presumably the prison contract physician would be entitled

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(b) The commissioner shall also establish internal procedures concerning appropriate exercise of the powers vested by this section.

under *Procunier v. Navarette* to qualified immunity to the same extent that privilege is afforded to other prison personnel that perform like discretionary functions given the long-standing policy rationales advanced by the Court.[18] *Forrester v. White*, 484 U.S. 219, 227 (1988) (immunity justified by the functions it protects and serves, not by the person to whom it attaches); *Cleavinger v. Saxner*, 474 U.S. 193, 201 (1985) (immunity flows not from rank or title or location within the government, but from the nature of the responsibilities of the individual involved); *Briscoe v. LaHue*, 460 U.S. 325, 342 (1983) (immunity analysis rests on functional categories not on the status of the defendant); *Butz v. Economou*, 438 U.S. 478, 503 (1978) (administrative hearing examiner is functional equivalent to a judge). Given the limited scope of *Wyatt*, it cannot be fairly read for the principle that private defendants can never assert a qualified immunity defense. These quasi-public correctional officers employed under state contract as authorized under state law and whose duties are identical to their corresponding public sector officials makes

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[18] Applying the functional analysis approach in *West* the several circuits that have considered whether private health care professionals acting under government contract or direction are entitled to qualified immunity uniformly have had little difficulty extending the privilege under the objective test advanced by the Court in *Harlow v. Fitzgerald*, 457 U.S. 800 (1982). *See Dolihite v. Maughon*, 74 F.3d 1027, 1044 (11th Cir.1996); *Leeks v. Cunningham*, 997 F.2d 1330, 1333 (11th Cir.1993); *Warner v. Grand County*, 57 F.3d 962, 966 (10th Cir.1995); *Williams v. O'Leary*, 55 F.3d 320, 323-24 (7th Cir.1995); *Frazier v. Bailey*, 957 F.2d 920, 928-29 (1st Cir.1992); *Rodriques v. Furtado*, 950 F.2d 805, 815 (1st Cir.1991).

it difficult to draw any meaningful substantive distinction relevant to qualified immunity analysis between these petitioners and the state and federal correctional officials in *Procunier v. Navarette* and *Cleavinger v. Saxner.*

It is well settled by the Court that the availability of qualified immunity to a particular state actor is directly related to the function a defendant fulfills rather than the actual position held. *Brisco v. LaHue*, 460 U.S. 325, 342 (1983) (immunity analysis rests on functional categories not on the status of the defendant). Thus when the function a quasi-public correctional officer serves ostensibly approximates the function a state employed correctional officer performs, it necessarily follows that the same policy considerations which provide qualified immunity to the public officers support the extension of qualified immunity to these petitioners. Thus this Court's holding in *Procunier v. Navarette* that affords qualified immunity in actions brought under 42 U.S.C. § 1983 should be applied with equal force to quasi-public correctional officers that perform vital and important discretionary state functions.

In extending qualified immunity to federal correctional officials the Court appropriately acknowledged the unique complexities and difficulties inherent in the management and operation of correctional facilities that make the exercise of discretion so essential and unique to the prison context.

> The administration of a prison is a difficult undertaking at best, for it concerns persons many of whom have demonstrated a proclivity for antisocial, criminal, and violent conduct . . . [Many] inmates do not refrain from harassment and intimidation. The number of

> non-meritorious cases that come into this Court's notice is evidence of this.

Cleavinger v. Saxner, 474 U.S. 193, 203 (1985)

The functional analysis approach employed by the Court when applied to this case inescapably ordains that qualified immunity should be extended to quasi-public correctional guards performing unique police powers of incarceration of convicted felons under state custody exclusively reserved to the sovereign. *Rendall-Baker v. Kohn*, 457 U.S. 830, 842 (1982) (the relevant question is not whether a private group is serving a "public function" but whether the function performed has been "the *exclusive* prerogative of the state"). *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345, 352-353 (1974). The traditional and exclusive public function delegated by the State of Tennessee by privatizing correctional services under the Private Prison Contracting Act of 1986, T.C.A. § 41-24-101 et seq. by contract to CCA and in turn to its quasi-public correctional officers similarly should turn on an analysis of the scope and nature of the function actually performed by petitioners and not whether one holds the status of government employee as opposed to private contract employee when the identical functions are conducted under color of law for the benefit of the public interest.

Quasi-public correctional officers acting under color of law in the performance of exclusive public functions delegated to them under state law and contract which require them to undertake the same discretionary public functions as their state and federal counterparts afforded

qualified immunity in *Procunier v. Navarette* and *Cleavinger v. Saxner* for the public benefit as performed by these quasi-public correctional officers warrants their entitlement to assert the defense of qualified immunity. Petitioners perform the identical discretionary functions in their daily interactions with violent criminal offenders, such as maintaining order and security within the facility and are required to make the same decisions in a high risk environment for the benefit of the public interest just as state correctional officers working at prisons operated by the state. Nor is there any allegation contained in the complaint that these petitioners conspired with government officials for parochial financial gain or self-interest to act beyond the boundaries of the law or the scope of their duties, which permits but does not require them to act in a certain manner. *Dennis v. Sparks*, 449 U.S. 24, 25 (1978) (action under § 1983 available against private co-conspirators of state trial judge that alleged to have corruptly issued an injunction even though judge has absolute immunity).

Denying qualified immunity to these quasi-public correctional officers employed by CCA under state contract furthers unsound policy accenting form over substance. Nothing in *Wyatt* remotely suggests that the Court intended to abandon its long-standing functional analysis approach in qualified immunity cases, nor does it appear that the *Wyatt* Court remotely intended to establish a per se bright line rule implicated by the Sixth Circuit's decision that private persons acting under color of law may never be shielded by qualified immunity.

In sum, the South Central Correctional Center is a prison facility operated and managed by the Corrections

Corporation of America under color of law, providing correctional services under state contract as authorized by Tennessee law as an innovative *experimental* program, whose performance standards and qualitative operations are pervasively regulated and supervised by the Tennessee Commissioner of Corrections, the Attorney General, and both houses of the Tennessee legislature under T.C.A. § 41-24-104. *Garcia v. San Antonio Metro. Authority*, 469 U.S. 528, 543-46 (1985) (concluding that the distinction between "traditional" governmental functions and proprietary functions was both unworkable in practice and unsound in principle, since it is inconsistent with federalism's basic tenet that states should be free to *experiment* with "any activity that their citizens choose for the commonweal").

These petitioners, in their capacity as quasi-public correctional officers employed by CCA (a company that but for the grace of state authorized privatization contracts would cease to operate altogether) for the provision of correctional services that can only be delegated to private sector service providers by government agencies that exclusively hold custodial police powers of detention, and other important correctional functions delegated to them by the State of Tennessee perform functions identical to state employed correctional officers. As custodial detention of an individual is an exclusive power reserved to the sovereign subject to certain limitations embodied in the Due Process Clause of the Fourteenth Amendment, CCA's quasi-public correctional officers may only provide correctional services as a "partner" or "joint venturer" with the Tennessee Department of Corrections under contract as expressly authorized by

Tennessee law. *Moose Lodge No. 107 v. Irvis*, 407 U.S. 163, 176-77 (1972).

The Court should afford qualified immunity to quasi-public correctional officers in furtherance of the public interest, as it did for the state prison officials in *Procunier v. Navarette*, 434 U.S. 555 (1978) and federal prison officials in *Cleavinger v. Saxner*, 474 U.S. 193 (1985). The dispositive issue presented here turns on the functional "relationship among the state, the [private actor], and the prisoner," *West v. Atkins*, 487 U.S. 42, 55-56 (1988). Given the functional relationship between the State of Tennessee, the petitioners as state actors operating as prison officials under state delegated authority and respondent as state prisoner warrants an extension of qualified immunity to these quasi-public correctional officers in suit arising under 42 U.S.C. § 1983. The policy concerns that litigation costs money and diverts public servants' energy from their public responsibilities and duties, and that the threat of liability deters those considering public service will "dampen the ardor of all but the most resolute, or the most responsible public officials, in the unflinching discharge of their duties," applies to the functions performed by CCA's correctional officers in their day to day discretionary responsibilities and high risk interactions with inmates that place them in harm's way unlike any other public servant. *Harlow v. Fitzgerald*, 457 U.S. 800, 814 (1982).

The burden of litigation against these quasi-public correctional officers coupled with the security and safety concerns carries with it the same risks and social costs as those faced by federal and state correctional and other law enforcement officers, and diverts their energies from

their duties as their government counterparts. While it is true that CCA did not contract to provide correctional services for the State of Tennessee simply for benevolent purposes, nonetheless any litigation expenses will ultimately be passed on to the State and the taxpayers as part of the cost of doing business. Furthermore the specter or threat of litigation will also deter those who might otherwise seek employment opportunities with CCA, and by CCA itself when it considers contracting their services with a governmental agency. There is no plausible reason to believe that the threat of personal liability suits brought under 42 U.S.C. § 1983 would have any less "dampening" effect on CCA correctional officers in the discharge of their discretionary duties than it would have on state and federal correctional officers.

SCCC is a prison managed and operated by CCA solely on behalf of the State of Tennessee, and the public has a significant interest in having those individuals that serve in these facilities do so free of the threat of unwarranted litigation. It furthers the public interest that qualified contractors such as CCA and these petitioners, quasi-public correctional officers not be discouraged from performing their important and essential governmental discretionary functions while employed at SCCC due to the ever present exposure to personal liability suits.

If the Sixth Circuit decision is permitted to stand, it could seriously erode the willingness of the several states, its political sub-divisions and the federal government to engage private contractors in the joint development of cooperative experimental programs in furtherance of the public good. This is particularly so as the society enters a period of government downsizing

and expanded reliance on the private sector to perform a variety of traditional public functions. Contrary to the Sixth Circuit's decision herein, extending qualified immunity to quasi-public correctional officers not only appropriately strikes a fair and proper balance between the strong societal interest of compensating individuals for unconstitutional deprivations but at same time ensures that these correctional guards will not be deterred and inhibited from performing vital and significant governmental functions. Affording qualified immunity to this discrete and narrow class: quasi-public correctional officers, is a reasonable and appropriate application of established doctrine. Ultimately qualified immunity as it has been developed by the Court provides only the necessary protection to "all but the plainly incompetent to those who knowingly violate [clearly established] law." *Malley v. Briggs*, 475 U.S. 335, 345 (1986). As qualified immunity only protects public officials who do not violate clearly established rights, extending the protections of qualified immunity here promotes the ability of quasi-public correctional officers to carry out their vital duties and responsibilities in a decisive and responsible manner.

In denying qualified immunity to these petitioners, the Sixth Circuit argued that:

> [W]hile private employed correctional officers are serving the public interest by maintaining a correctional facility, they are not principally motivated by a desire to further the interests of the public at large. Rather as employees of a private corporation seeking to maximize profits, correctional officers act, at least in part, out of a desire to maintain the profitability of the corporation for whom they labor, thereby ensuring

> their own job security it arguably does not vitiate furtherance of the public interest, it upsets the balance qualified immunity seeks to establish "between compensating those who have been injured by official conduct and protecting government's ability to perform its traditional public functions". *Wyatt*, 504 U.S. at 167. (citation omitted) The balance struck by qualified immunity, at least implicitly, contemplates a government actor acting for the good of the state, not a private actor for the good of the pocketbook. With respect to cutting corners on constitutional guarantees, one commentator has explained that "[e]ntrepreneurial jailers benefit directly, in the form of increased profits, from every dime not spent." Note, *The Panopticon Revisited: The Problem of Monitoring Private Prisons*, 96 YALE L.J. 353, 357 (1986).

88 F.3d at 424. (Pet. App. 15-16)

The rationale offered up by the Sixth Circuit that private sector prison contractors will "cut corners on constitutional guarantees" for "the good of the pocketbook" unfairly characterizes the reality of the marketplace and is unsupported by the available empirical evidence which is to the contrary.[19] Under T.C.A.

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[19] *See*, e.g., C. Logan, *Well Kept: Comparing Quality of Confinement in Private and Public Prisons*, 83 J. Crim. L. & Criminology 577, 601 (1992). The study included 333 empirical categories designed to measure different areas regarding the quality of prison confinement. The *Logan* study concluded that private prisons outperformed state and federal prisons by substantial margins across nearly all categories.

§ 41-24-105 CCA must adhere to established constitutional norms[20] and legal standards in order to secure and maintain their contractual relationship with the State of Tennessee.[21] In 1993 pursuant to T.C.A. § 41-25-105(c) the Tennessee legislature convened a Select Oversight Committee on Corrections which studied the comparative operations of two state operated facilities along with the South Central Correctional Center operated by CCA where respondent McKnight is housed. After a two year study the Oversight Committee awarded SCCC a higher

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[20] The litigation experience of private correctional companies reveals that by 1996 not one privately operated and managed facility is operating under court order or consent decree while three-quarters of state jurisdictions have major facilities or their entire correctional system operating under court supervision. C. Thomas, *Correctional Privatization: The Issues and the Evidence*, pp. 40-41 (Frazier Institute, Toronto, Canada 1996).

[21] It is noteworthy that the South Central Correctional Center where respondent McKnight is confined is accredited by the American Correctional Association (ACA), along with 15 other additional CCA managed facilities. CORRECTIONS CORPORATION OF AMERICA, 1995 Annual Report at 14. The ACA is an independent organization that has developed objective standards and guidelines to safeguard the life, safety and health of offenders and correctional personnel. The ACA accreditation standards are the most widely recognized guidelines and cover such areas as administration, personnel, staff training, security, health care, food service, inmate supervision and physical plant. *See*, AMERICAN CORRECTIONAL ASSOCIATION, STANDARDS FOR ADULT CORRECTIONAL INSTITUTIONS (3rd Edition 1990). In 1989 only 26% of federal and state managed correctional facilities were accredited by the ACA. Logan, *supra* at 598.

overall performance rating than the two state operated facilities.[22]

Qualified immunity has never been based on a public official's benevolent desire to promote and serve the public good but instead that the public interest is advanced if those individuals that perform vital and important governmental functions are able to act decisively in their official capacity free of the threat of unwarranted and distracting vexatious litigation. Nevertheless, the fact is that any quasi-public correctional officer who intentionally, knowingly and deliberately violates the clearly established constitutional rights of the inmates placed in their custodial charge to increase the pocket-book of the corporate master they serve would not enjoy the protection of qualified immunity. *Harlow v. Fitzgerald*, 457 U.S. 800, 815-16 (1982). Extending qualified immunity to these quasi-public correctional officers advances the public good in the same manner as it does with federal and state employed correctional officers. This is so as qualified immunity furthers and promotes efficient and effective discretionary performance of significant governmental functions so vital to the public interest in the hard-core context of the realities of the prison environment and encourages the retention of competent professional employees and qualified applicants seeking employment with public sector contractors such as CCA instead of

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[22] Tennessee Select Oversight Committee on Corrections, *Comparative Evaluation of Privately Managed Corrections Corporation of America Prison (South Central Correctional Center) and State Managed Prototypical Prisons (Northeast Correctional Center, Northwest Correctional Center) at pp. vii-x (Executive Summary) (February 1, 1995).*

deterring them from entering an alternative form of public service.

In the end, extending qualified immunity to quasi-public correctional officials ultimately reduces the overall cost of litigation, and along with other efficiencies, the total costs of financing and operating private correctional facilities which ultimately the public treasury and the taxpayers support. So long as qualified immunity promotes the public interest as abundantly demonstrated herein, the fact that it may also advance and benefit the corporate interests of CCA, its shareholders and employees is of no legal import on the question before the Court of whether quasi-public correctional officers should enjoy the defense of qualified immunity.

As more essential governmental services are provided by contracts and grants with the private sector rather than from the direct efforts of state agencies, the public policy considerations that accord qualified immunity to public officials should apply with the same force to quasi-public officials. This is so as there appear to be no sound public policy considerations that weigh against extending qualified immunity to any quasi-public official that exercises discretionary public functions as performed by their corresponding state actor.

VII. CONCLUSION

In conclusion, petitioners ask this Court to hold that quasi-public correctional officers who perform exclusive and vital governmental functions that require the exercise of discretion under contract with the State are entitled to

qualified immunity if a government official would have been entitled to the immunity had he performed the same function instead.

For the foregoing reasons petitioners pray the judgment of the United States Court of Appeals for the Sixth Circuit denying them qualified immunity be reversed and the matter remanded to the district court with directions to grant the petitioners' motion to dismiss this action.

Respectfully submitted,

ROBERT S. CATZ
9 Music Square South
Nashville, Tennessee 37203
(615) 780-3594

CHARLES R. RAY
Counsel of Record
JEFFERY S. FRENSLEY
211 Third Avenue North
Nashville, Tennessee 37201
(615) 256-2111

Counsel for Petitioners

January 13, 1997

Supreme Court, U.S.
FILED
FEB 12 1997
CLERK

No. 96-318

IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

DARYLL RICHARDSON AND JOHN WALKER,
Petitioners,

v.

RONNIE LEE MCKNIGHT,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF OF RESPONDENT RONNIE LEE McKNIGHT

DAVID C. VLADECK
(Counsel of Record)
CLAUDIA POLSKY
MICHAEL E. TANKERSLEY
ALAN B. MORRISON
PUBLIC CITIZEN LITIGATION GROUP
1600 20th Street, N.W.
Washington, D.C. 20009-1001
(202) 588-1000
Attorneys for Respondent

February 12, 1997

48 pp

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QUESTION PRESENTED

Are prison guards employed by a private, for-profit corrections corporation that carries out functions traditionally performed by a state department of corrections entitled to assert qualified immunity in an action for damages brought under 42 U.S.C. § 1983?

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

NO. 96-318

DARYLL RICHARDSON AND JOHN WALKER,
Petitioners,

v.

RONNIE LEE MCKNIGHT,
Respondent.

On Writ of Certiorari to the
United States Court of Appeals for the Sixth Circuit

BRIEF OF RESPONDENT RONNIE LEE McKNIGHT

STATEMENT OF THE CASE

A. Factual Background

Respondent Ronnie Lee McKnight is a prisoner at the South-Central Correctional Center (SCCC) in Tennessee. He filed an action for damages under 42 U.S.C. § 1983 against petitioners Daryll Richardson and John Walker, two prison guards employed by the Corrections Corporation of America (CCA), and SCCC's Warden, John Rees. CCA is a private, for-profit corporation that operates SCCC under contract with the Tennessee State Department of Corrections pursuant to Tennessee's Private Prison Contracting Act of 1986, Tenn. Code Ann. § 41-24-101 *et seq.*

McKnight's complaint asserts that petitioners infringed his Eighth Amendment right to be free from cruel and unusual punishment by transporting him to the SCCC in handcuffs and ankle shackles that were far too tight for his large frame. His discomfort was so evident that other inmates on the bus implored petitioners to loosen the

restraints. Pet. App. 44, 45. Not only did petitioners refuse to loosen McKnight's shackles, but they showered him with abusive language, telling him that he "was getting what he deserved" and that he should "suffer." *Id.* at 46, 47. McKnight, who weighs 302 pounds and is in poor health, alleges that the cuffs and shackles cut off his circulation and caused extreme pain and swelling. *Id.* at 45-46. By the time McKnight arrived at the SCCC, he could not walk without assistance. *Id.* at 47. His injury from the cuffs and shackles was so severe that he required hospitalization, and he continues to receive treatment to improve circulation to his limbs. *Id.*

B. Decisions Below

McKnight filed this action *pro se* on March 3, 1994, in the United States District Court for the Middle District of Tennessee. Because McKnight sought leave to proceed *in forma pauperis*, the district judge referred McKnight's complaint to a Magistrate Judge to evaluate whether "the action [was] frivolous or malicious." 28 U.S.C. § 1915(d). The Magistrate Judge concluded that the "plaintiff states an arguable claim that his Eighth Amendment rights were violated by the SCCC transport officers. The Eighth Amendment prohibits the unnecessary and wanton infliction of pain upon a prison inmate." Docket Entry 4, at 3. The Magistrate Judge recommended dismissal of McKnight's claim against the Warden, however, because he was not alleged to "have had any actual involvement in the transport incident," and dismissal of McKnight's claim based on the demeaning and degrading remarks made by the guards, because neither verbal abuse nor slander is actionable under § 1983. *Id.* at 4. After further briefing, the district court adopted the Magistrate Judge's report and recommendation, allowing McKnight's Eighth Amendment claims against petitioners to proceed. Docket Entry 5.

Petitioners then moved to dismiss on the basis of qualified immunity. Their motion was referred to the

Magistrate Judge, who recommended that it be denied on the basis of *Manis v. Corrections Corp. of America*, 859 F. Supp. 302 (M.D. Tenn. 1994), which rejected a qualified immunity defense for other CCA employees. Pet. App. 26-27. The district court agreed and overruled petitioners' objections. *Id.* at 23.

Petitioners filed an interlocutory appeal, *see Mitchell v. Forsyth*, 472 U.S. 511 (1985), to the Sixth Circuit. That court affirmed, holding that private guards employed by a for-profit corporation that operates a correctional facility under contract with a state are not entitled to qualified immunity. *McKnight v. Rees*, 88 F.3d 417 (6th Cir. 1996). Relying on the statement in *Wyatt v. Cole*, 504 U.S. 158, 168 (1992), that "the rationales mandating qualified immunity for public officials are not applicable to private parties," the court noted that, while qualified immunity is needed to protect "a government actor acting for the good of the state," it is not warranted for "a private actor acting for the good of the pocketbook," who has a "greater incentive to cut costs by infringing upon the constitutional rights of prisoners." Pet. App. 15 n.4, 16.

The court also rejected petitioners' contention that conferring immunity on privately-employed prison guards would serve "the public policy underpinnings of qualified immunity." *Id.* at 14-16. Although the court agreed that private prison guards "are serving the public interest by maintaining a correctional facility," it concluded that "as employees of a private corporation seeking to maximize profits, correctional officers act, at least in part, out of a desire to maintain the profitability of the corporation for whom they labor, thereby ensuring their own job security." *Id.* at 15 (footnote omitted). The court likewise rejected petitioners' argument that "the denial of qualified immunity here will . . . deter talented candidates from entering public service," a consideration the court noted was "another of the major concerns undergirding the qualified immunity doctrine." *Id.* at 17. In the court's view, "[so] long as a

profit can be realized from the venture, we have no fear that denying qualified immunity to these defendants will result in a dearth of qualified applicants seeking entry into the field." *Id.* at 18.

Finally, the court explicitly left open the possibility that on remand petitioners could assert a good faith defense. *Id.* at 19. As developed in the Sixth Circuit and elsewhere, a good faith defense will generally permit a defendant who can show that he acted reasonably and without malice to obtain summary judgment.

Judge David A. Nelson concurred in a separate opinion. He agreed that both *Wyatt v. Cole* and the Sixth Circuit's decision in *Duncan v. Peck*, 844 F.2d 1261 (1988), compelled the panel's ruling. Pet. App. 20-21. But Judge Nelson noted that, if the panel were free to decide the case on public policy grounds alone, he would afford petitioners qualified immunity. Pet. App. 19-20.[1]

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[1] Petitioners presented one question in their petition for *certiorari*: whether private prison guards are entitled to qualified immunity in a damages action brought pursuant to § 1983. They now present an additional question for review, namely, whether private prison guards are "state actors subject to liability under 42 U.S.C. § 1983 for conduct committed under color of law." Pet. Br. i; *see also id.* 14-20. Petitioners did not dispute below that "they were acting under the color of state law for the purposes of section 1983 liability," and hence the Sixth Circuit "assume[d] without deciding this fact for the purpose of appeal." Pet. App. 3 n.3. Because there is no disagreement between the parties regarding petitioners' amenability to suit under § 1983, and because this issue was not raised or decided below, it is not properly before the Court.

SUMMARY OF ARGUMENT

Petitioners ask this Court to break new legal ground by extending governmental immunity under § 1983 to private prison guards. They do not seek this dramatic extension of immunity law to further any discernable governmental interest, but rather to facilitate the contracting out of core governmental functions to for-profit corporations. And petitioners are not content with the good faith defense recognized by a number of circuits in the aftermath of *Wyatt*. Instead, they seek a broad immunity from suit, one that requires civil rights complaints to be dismissed prior to discovery unless the defendant violated a clearly established constitutional norm.

Petitioners cannot meet the exacting standards that this Court has invariably applied in governmental immunity cases. Section 1983 was enacted both to deter civil rights violations and to provide a means of redress to individuals deprived of federally guaranteed rights by those acting under color of state law. It is written in broad, categorical terms and contains no exceptions or immunities. For that reason, this Court has conferred immunity on government officials, either absolute or qualified, only where a tradition of immunity was firmly rooted in common law and the immunity was supported by strong policy reasons. *Owen v. City of Independence*, 445 U.S. 622, 629 (1980). Petitioners satisfy neither of these requirements.

I.

Petitioners do not argue that there is any common law basis for conferring qualified immunity on privately employed prison guards. Nor could they, since there is no historical antecedent for any immunity for private persons from tort liability arising out of the unlawful exercise of governmental power. That should end this Court's inquiry because, as this Court has repeatedly said, it does not have a "license to establish immunities from § 1983 actions" in the interests of what it "judge[s] to be sound public policy."

Tower v. Glover, 467 U.S. 914, 922-23 (1984). Yet that is precisely what petitioners are asking this Court to do: impose its own policy judgments about the wisdom of conferring governmental immunity to facilitate the contracting-out of governmental functions. The question whether immunities not existing at common law should be engrafted onto § 1983 is fraught with difficult and fact-intensive policy choices that Congress, not this Court, ought to make. Accordingly, because there is no common law basis for extending qualified immunity to any private parties, this Court should adopt the bright-line rule suggested in *Wyatt* that qualified immunity is unavailable to non-governmental actors.

II.

Petitioners base their claim for immunity solely on the contention that, because private prison guards undertake many of the functions performed by state employees, they should, as a policy matter, be extended the same protection from suits alleging civil rights violations. Even assuming a functional equivalence in the work performed, it does not follow that private guards are entitled to the shield of *governmental* immunity.

A. The main justification for qualified immunity for government officials is to "preserve their ability to serve the public good." *Wyatt*, 504 U.S. at 167. As with all for-profit companies, however, CCA is principally concerned with enhancing its financial performance. CCA owes a fiduciary duty to its corporate shareholders to maximize profits, and this duty surely plays a critical role in CCA's decision-making. The same duty extends to CCA's employees, who profit whenever CCA profits. Thus, there is a substantial risk that CCA employees will sacrifice the rights of inmates on the altar of CCA's financial self-interest. Government officials, in contrast, exercise their discretion *solely* for the public's benefit. Because CCA's employees do not owe an undivided loyalty to the public, they should not be accorded governmental immunity.

B. Petitioners cannot plausibly argue that qualified immunity is needed to "ensure that talented candidates [are] not deterred by the threat of damages suits from entering public service," another justification for governmental immunity stated in *Wyatt*. Aside from the fact that CCA employees are not "entering public service," CCA has an arsenal of inducements available to attract qualified candidates that are generally beyond the reach of government: wage premiums, profit sharing arrangements, employee stock option plans, and, most pertinent to this case, insurance indemnification. As petitioners concede, CCA has indemnified them for litigation costs and may also insure employees against adverse judgments. Nor is qualified immunity essential to CCA's operations, since CCA certainly considered civil rights litigation as a cost of doing business when it bid for the contract to operate SCCC, and, in any event, CCA is fully insured against liability.

C. Petitioners' claim, that for immunity purposes there are no meaningful distinctions between public and private prison guards, is untenable. First, governmental immunity is based, in part, on the recognition that the political system places constraints on governmental actors to deter violations of constitutional norms, and holds those who do commit violations accountable through non-judicial means. *Harlow v. Fitzgerald*, 457 U.S. 800 (1982). CCA and its employees are largely insulated from those constraints. Second, because CCA is a private company, CCA's employees lack the protections that enable government employees to criticize official governmental action without fear of reprisal. CCA employees who want to express concern over CCA's treatment of inmates, for example, would do so at their peril, because Tennessee, like most states, provides private employees scant protection from retaliatory discharge.

D. No policy argument favors extending governmental immunity to privately-employed prison guards. *Wyatt* raised the concern that if private parties lack immunity, they may be unfairly held liable where they reasonably rely on a

statute or legal process later held to be unconstitutional. That concern is not present here, since McKnight has alleged a knowing and deliberate violation of established Eighth Amendment standards. Moreover, many circuits, including the Sixth, recognize a defense of good faith that would protect individuals facing the dilemma identified in the *Wyatt* dissent.

Finally, the absence of qualified immunity will not subject CCA and its employees to endless rounds of vexatious prisoner litigation. Prisoner suits must survive a gauntlet of procedural and substantive requirements that deter and weed out non-meritorious cases. Congress has recently imposed additional burdens on prisoner-plaintiffs in the Prison Litigation Reform Act of 1996, which is designed specifically to reduce the volume of frivolous prisoner litigation under § 1983. If further controls on prisoner litigation are warranted, that policy judgment should be made by Congress, not this Court.

ARGUMENT

NEITHER THE COMMON LAW NOR PUBLIC POLICY JUSTIFIES AN EXTENSION OF THE DOCTRINE OF QUALIFIED IMMUNITY TO PRIVATE PARTIES.

Petitioners ask the Court to do something without precedent: extend a governmental immunity to employees of a private, for-profit corporation because their employer has chosen to make its money by performing contract work for a state government. What petitioners seek is broad immunity from suit, not merely a defense to liability if they can show good faith. Qualified immunity entitles a § 1983 defendant to the immediate dismissal of a plaintiff's case, before discovery or an evaluation of the merits, unless the defendant's conduct violated a clearly established constitutional norm. *Harlow v. Fitzgerald*, 457 U.S. 800,

818 (1982). The test is an objective one. The defendant's state of mind is not only irrelevant, but ordinarily it may not be probed by the plaintiff, since one role of qualified immunity is to spare the governmental defendant the burden of discovery. *Id.*; *Behrens v. Pelletier*, 116 S. Ct. 834 (1996). Thus, even where the defendant acted "with the malicious intention to cause a deprivation of constitutional rights or other injury," the plaintiff's case must be dismissed so long as the right allegedly violated was not clearly established. *Harlow*, 457 U.S. at 815; *see also Crawford-El v. Britton*, 93 F.3d 813, 816 (D.C. Cir. 1996) (*en banc*), *cert. pending*, No. 96-827; *see also id.* at 831 n.5 (Silberman, J., concurring).

Not only does the immunity sought by petitioners exceed the good faith defense available to private § 1983 defendants in most circuits, but it is also far broader than the litigation protection available to *government* law enforcement officers at common law. *See Pierson v. Ray*, 386 U.S. 547, 557 (1967) (the "defense of good faith and probable cause" was available to police officers at common law). The Court should be particularly reluctant to extend immunity to § 1983 defendants where non-governmental actors seek to be treated like the sovereign solely for immunity purposes, and do not otherwise assume the political accountability and other burdens associated with governing.[2]

As this Court has often noted, § 1 of the Civil Rights Act of 1871, now codified at 42 U.S.C. § 1983, "creates a species of tort liability that on its face admits of no immunities." *Imbler v. Pachtman*, 424 U.S. 409, 417 (1976). The statute imposes liability on "every person" who, under color of state law, "subjects, or causes to be subjected,

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[2] Petitioners refer to themselves as "quasi-public" servants throughout their brief, but that label has no legal significance. *FTC v. Ruberoid Co.*, 343 U.S. 470, 487-88 (1952) (Jackson, J., dissenting).

any citizen of the United States . . . to the deprivation of any rights, privileges or immunities secured by the Constitution and laws." 42 U.S.C. § 1983. The legislative history "confirm[s] the expansive sweep of the statutory language." *Owen v. City of Independence*, 445 U.S. 622, 635-36 (1980).

Section 1983 plays a dual role in protecting citizens' constitutional and statutory rights — it "deter[s] actors from using the badge of their authority to deprive individuals of their federally guaranteed rights," and it "provide[s] relief to victims if such deterrence fails." *Wyatt v. Cole*, 504 U.S. at 161 (citation omitted). Because of the critical role § 1983 plays in safeguarding individual liberties, courts must be extremely careful when "devising limitations to [this] remedial statute, enacted by Congress, which on its face does not provide for *any* immunities." *Id.* at 171 (Kennedy, J., joined by Scalia, J., concurring) (citation omitted; emphasis in original). Recognizing "the significance of the societal interest in compensating the innocent victims of governmental misconduct," *Owen*, 445 U.S. at 653, the Court has been willing to afford absolute or qualified immunity to § 1983 defendants only in extremely limited circumstances. This reluctance is warranted because, notwithstanding petitioners' attempt to impugn all civil rights litigation as "vexatious," Pet. Br. 11, 24, 27, immunity bars litigation of all but the strongest, most meritorious claims.

For these reasons, *Wyatt* reaffirmed that, in deciding whether a party is entitled to immunity, the Court requires both (1) a common law basis for affording immunity when the Civil Rights Act was enacted in 1871; *and* (2) strong public policy reasons supporting preservation of that immunity. 504 U.S. at 164; *see also City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 259 (1981); *Owen v. City of Independence*, 445 U.S. at 637; *Hafer v. Melo*, 502 U.S. 21, 29 (1991). Petitioners satisfy neither requirement.

I. THE EXTENSION OF QUALIFIED IMMUNITY TO PRIVATE EMPLOYEES IS NOT SUPPORTED BY THE COMMON LAW.

Abandoning any pretense that the immunity they seek has an antecedent at common law, petitioners argue that "this Court needs no considered common law inquiry for granting qualified immunity to these . . . correctional officers." Pet. Br. 33. In all of its § 1983 immunity jurisprudence, however, this Court has insisted that a firm historical basis is a prerequisite to considering the recognition of qualified or absolute immunity because the statute provides for none. *See, e.g., Wyatt v. Cole*, 504 U.S. at 164 (stating that when confronted with a claim to immunity, the Court looks first to whether the "tradition of immunity . . . [is] firmly rooted in the common law" (quoting *Owen v. City of Independence*, 445 U.S. at 637); *accord Malley v. Briggs*, 475 U.S. 335, 339-40 (1986); *Tower v. Glover*, 467 U.S. at 920.

The Court has preserved absolute immunity for some high-level government actors such as judges, because "few doctrines were more solidly established at common law than the immunity of judges from liability for damages for acts committed within their judicial jurisdiction." *Pierson v. Ray*, 386 U.S. at 553-54. Firm historical precedent has similarly led the Court to preserve absolute immunity for prosecutors and state legislators, *Imbler v. Pachtman*, 424 U.S. at 422; *Tenney v. Brandhove*, 341 U.S 367, 376 (1951), and to spare municipalities liability for punitive damages under § 1983. *City of Newport v. Facts Concerts, Inc.*, 453 U.S. at 260.

The Court has also maintained qualified immunity for state prison officials and other lower-level personnel because of "the common law immunity afforded government officials." *Procunier v. Navarette*, 434 U.S. 555, 561 (1978). Thus, qualified immunity has been made available to, *inter alia*, police officers charged with unconstitutional arrests, *Pierson v. Ray*, 386 U.S. at 557, because the defense

of good faith and probable cause "[was] available to a police officer in the common-law action for false arrest and imprisonment"; to state executive officials charged with unconstitutional use of force, *Scheuer v. Rhodes*, 416 U.S. 232, 241 (1974), because in England a degree of immunity for the executive branch was "long a creature of the common law — [and the Founders] remained committed to the common law"; and to members of a prison disciplinary committee, whose adjudicatory role entitled them to some of the "common law . . . immunity of judges." *Cleavinger v. Saxner*, 474 U.S. 193, 199 (1985).

There is, however, no historical basis in English or American common law for any immunity for private persons from torts arising out of the unlawful exercise of government power. *See Wyatt*, 504 U.S. at 165 ("Even if there were sufficient common law support to conclude that respondents . . . should be entitled to a good faith defense, that would still not entitle them to . . . the qualified *immunity* from suit accorded government officials"); *see also Duncan v. Peck*, 844 F.2d 1261, 1264 (6th Cir. 1988) (there is "no evidence that the common law ever extended immunity to include private citizens"). And, although the burden falls squarely on petitioners to anchor their immunity claim to a firm historical mooring, *Malley*, 475 U.S. at 339-40, their brief effectively concedes that there is none.

Immunities from suit are unavailable to private persons because, at root, governmental immunities derive from the ancient maxim that "the King can do no wrong." Harper, *et al.*, 5 *The Law of Torts* 599, § 29.2 (2d ed. 1986). Permitting the King to be sued in his own court was considered antithetical to his sovereignty, and, over time, the concept of immunity was broadened to encompass other government officials. *Id.* This Court's unwillingness to construe governmental immunities expansively stems from the recognition that, in a democracy, the notion of even a sovereign's infallibility is an anachronism. As Professor Harper observed:

> Just how an immunity that had its roots in feudalism and in a political philosophy associated with the divine right of kings was transplanted to the new republic in America remains something of a mystery. . . . The heavy indebtedness of the states and their precarious financial condition during the years immediately after the Revolution no doubt played a part in this.

Id. 599 & n.8. Whatever the wisdom of importing sovereign immunity concepts into our law for governmental actors, there is no evidence that sovereign immunity played any role in civil litigation against private parties at common law.

The requirement of a common law precedent for a current claim to immunity remains intact even after *Harlow*. To be sure, *Harlow* "completely reformulated qualified immunity along principles not at all embodied in the common law," *Anderson v. Creighton*, 483 U.S. 635, 645 (1987), by replacing the subjective inquiry into malice with the test of objective reasonableness. But *Harlow* did not address, much less abandon, the common law focus on whether a particular type of government actor should receive immunity. Four years after *Harlow*, all members of the Court appeared to endorse the statement in *Malley* that "[o]ur *initial inquiry* is whether an official claiming immunity under § 1983 can point to a common-law counterpart to the privilege he asserts." 475 U.S. at 339-40 (emphasis added).[3]

The requirement of a historical foundation for any immunity is critical, because the *only* justification for grafting immunities onto a statute that facially admits none

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[3] Although *Malley* was not unanimous, the two Justices who concurred in part and dissented in part stated that they "agree[d] with much of the Court's opinion," 475 U.S. at 346 (Powell, J., joined by Rehnquist, J.), and took issue only with aspects of the decision that are not relevant here.

was the Court's conclusion that the Congress of 1871 did not intend to abrogate then-existing immunities "by covert inclusion in the general language" of § 1983. *Tenney v. Brandhove*, 341 U.S. at 376. There is no justification for creating *new* immunities subsequent to the passage of a deliberately sweeping remedial statute.

Because there is no historical basis for conferring immunity on private actors, the Court's inquiry should be at an end. As the Court has repeatedly recognized, "our role is to interpret the intent of Congress in enacting § 1983, *not to make a freewheeling policy choice*, and . . . we are guided in interpreting Congress' intent by the common-law tradition." *Malley*, 475 U.S. at 342 (emphasis added); *see also Wyatt*, 504 U.S. at 171-72 ("It must be remembered that unlike common-law judges whose doctrines we adopt, we are devising limitations to a remedial statute, enacted by Congress, which 'on its face does not provide for any immunities.' . . . [w]e may not transform what existed at common law based on our notions of policy or efficiency.") (Kennedy, J., joined by Scalia, J., concurring) (internal citation omitted); *Tower*, 467 U.S. at 922-23.

Despite the Court's insistence on a common law basis for immunity claims, petitioners make no effort to justify their argument for immunity within the *Wyatt* framework. Petitioners instead contend that the Court should employ the "functional test" that it has used to determine whether *government* officials claiming immunity perform functions similar to governmental actors who had immunity at common law. Pet. Br. 32-46. Under petitioners' theory, private employees should be entitled to immunity whenever they perform functions similar to those carried out by government employees who would have immunity. *Id.* But this Court has never suggested that its "functional test" has any bearing on whether immunity should be extended to *non*-governmental employees. Nor does petitioners' approach even acknowledge the considerable differences between government and private employees that justify differential

treatment in terms of immunity — an issue addressed below.

Even more fundamentally, petitioners' approach is incompatible with *Wyatt*. *Wyatt* recognized that private parties who deprive innocent persons of their legal rights while pursuing personal gain should not have qualified immunity, which would deprive the victims of the opportunity to recover the damages they sustained. Although *Wyatt*'s holding was narrow, the principle on which it rested was not. In deciding that qualified immunity is unavailable to "private defendants faced with § 1983 liability for invoking a state replevin, garnishment, or attachment statute," 504 U.S. at 168-69, the Court stated categorically that "the nexus between private parties and the historic purposes of qualified immunity is simply too attenuated to justify such an extension of our doctrine of immunity." *Id.* at 168.

Wyatt's rationale applies with equal force here. Petitioners — like all private employees of profit-making corporations — are pursuing private gain just as much as the erstwhile cattle baron and his lawyer in *Wyatt*. Their motive is financial reward, not public service. Equally important, by refusing to extend qualified immunity beyond the confines of the common law, the Court would put the policy question whether to create additional immunities to facilitate the privatization of state functions precisely where it belongs: in the hands of Congress. *See Tower*, 467 U.S. at 923.

Because there is no common law support for the immunity petitioners assert, and because the Court has uniformly refrained from making "freewheeling policy choice[s]" regarding immunity, *Malley*, 475 U.S. at 342, the Court should hold that private parties may not invoke qualified immunity to deprive § 1983 plaintiffs of their right to obtain legal redress.

II. THE EXTENSION OF QUALIFIED IMMUNITY TO PRIVATE PRISON GUARDS IS NOT SUPPORTED BY PUBLIC POLICY.

Petitioners' claim should also be rejected because it lacks the "strong" policy justifications that the Court has required before conferring immunity. *See Wyatt*, 504 U.S. at 164-66; *City of Newport*, 453 U.S. at 258-59. As this Court has emphasized, "irrespective of the common law support, we will not recognize an immunity available at common law if § 1983's history or purpose counsel against applying it in § 1983 actions." *Wyatt*, 504 U.S. at 164.

The *Wyatt* Court identified two public policy rationales supporting qualified immunity for certain government officials: the need to "preserve their ability to serve the public good," and the need to "ensure that talented candidates [will not be] deterred . . . by the threat of damages suits from entering public service." *Id.* at 167. These rationales are irrelevant to the private sector. As *Wyatt* noted, "private parties hold no office requiring them to exercise discretion; nor are they principally concerned with enhancing the public good." *Id.* at 168.

This observation has resonance here because petitioners seek to equate work performed under government contract with public service. The question posed in this case is whether qualified immunity should be extended to enhance the ability of for-profit corporations to perform work under government contract. Although this case concerns prison guards, it could just as well involve employees of private companies performing a host of functions that historically were thought to be exclusively governmental.

Privatization may or may not improve government efficiency. But it is significant that this plea for a dramatic expansion of immunity comes not from the State of Tennessee, but from the employees of a private company that is fully insured against its losses. Enhancing the profitability

of private contractors by undercutting the effectiveness of the civil rights laws furthers no legitimate policy interest, and certainly no interest "consistent with § 1983's history or purpose." *Wyatt*, 504 U.S. at 164. Accordingly, although the reasons set forth below explain why private prison guards ought not to be given qualified immunity, most apply equally to employees of other private contractors and support the conclusion that qualified immunity under § 1983 should not be extended to any private actors.

A. Prison Corporations And Their Private Employees Do Not Principally Serve The Public Good.

CCA and its private prison guards perform a service typically provided by the public sector, and, as the Sixth Circuit acknowledged, this service undoubtedly "further[s] the public good." Pet. App. 15. Nonetheless, CCA, as a profit-driven corporation, is principally serving its own financial ends. It is hornbook law that "a corporation should have as its objective the conduct of business activities with a view to enhancing corporate profit and shareholder gain." American Law Institute, *Principles of Corporate Governance* § 2.01(a) (1994); *see also Dodge v. Ford Motor Co.*, 170 N.W. 668 (Mich. 1919). Thus, CCA cannot be motivated primarily, much less solely, by a desire to serve the public interest, because it is required to put its shareholders' interests above all others.

While petitioners and their *amici* assert that cost-cutting motives should not be imputed to correctional officers based on the for-profit status of their employer, they overlook the fact that CCA's profit motive extends directly to its individual employees, such as petitioners. First, petitioners' economic well-being is closely tied to CCA's financial performance. In the words of the Sixth Circuit, "as employees of a private corporation seeking to maximize profits, correctional officers act, at least in part, out of a

desire to maintain the profitability of the corporation for whom they labor, thereby ensuring their own job security." Pet. App. 15. Second, all CCA employees are eligible to participate in its Employee Stock Ownership Plan (ESOP) after one year of service. The ESOP is an investment and retirement plan through which employee and CCA contributions are invested primarily in the common stock of CCA.[4] Because individual CCA shareholder-guards profit whenever CCA profits, the Sixth Circuit's focus on CCA's concern with "the good of the pocketbook" (Pet. App. 15-16) as a factor in the behavior of individual officers was entirely appropriate. Indeed, no less than fifty years ago this Court recognized the potentially corrosive effect of financial self-interest on the independence of government decision-making. *See Tumey v. Ohio*, 273 U.S. 510 (1927).

There are many circumstances in which CCA guards may face a conflict between serving a private master and the public. For example, CCA facilities are compensated by the government at "a net rate per day per inmate . . . . or at a fixed monthly rate," and transportation of inmates is compensated "on a per mile or a fixed fee per trip" basis. CCA, *1995 Annual Report to Shareholders* 38. This flat-rate pricing creates an incentive for both CCA and its employees to minimize the time and expense associated with providing services to prisoners — such as transportation, medical care, vocational training, and the like — because any increased costs of customized care cannot be passed along to the State.

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[4] *See* CCA, *1994 Annual Report to Shareholders* 51: "The Corporation maintains a stock incentive plan which allows for the granting of incentive and non-qualified stock options to all employees on a discretionary basis. The Corporation also maintains a stock option plan . . . ." *See also* CCA, *Amended and Restated Corrections Corporation of America Employee Savings and Stock Ownership Plan Summary Plan Description* 6 (undated).

Petitioners' dedication to CCA's profitability is fundamentally incompatible with the justification for governmental immunities — the need to preserve the ability of government officials to exercise independent judgment solely for the public good. Although petitioners suggest that the "discretionary functions" inherent in a prison guard's job are enough reason to extend qualified immunity, *see* Pet. Br. 35, this argument misses the mark. Qualified immunity is conferred on government actors whose jobs entail "discretion" only because the government is *required* to provide certain core services to the public and because the government exists and acts *solely* to further the public good. As John Locke explained more than two centuries ago:

> Where the legislative and executive power are in distinct hands . . . there the good of the society requires that several things should be left to the discretion of him that has the executive power. . . . [T]here is a latitude left to the executive to do many things of choice which the laws do not prescribe. This power *whilst employed for the benefit of the community*, and suitably to *the trusts and ends of the government*, is undoubted prerogative, and never is questioned.

John Locke, "Of Prerogative," in *The Second Treatise on Civil Government* 80-82 (J.W. Gough, ed. 1947) (1690) (emphasis added). *See also Forrester v. White*, 484 U.S. 219, 232 (1988) (emphasizing the need for government agents to exercise independent judgment for the public good); *Scheuer v. Rhodes*, 416 U.S. at 241 (recognizing the unfairness of second-guessing official "decisions and action to enforce laws for the protection of the public" because "it is not a tort for government to govern") (quotation omitted). The exercise of discretionary judgment alone, where there is no guarantee that judgments are made to advance public

rather than private ends, does not justify an extension of immunity. Indeed, it counsels against it.[5]

Finally, although qualified immunity should not be conferred on a for-profit corporation or its employees regardless of the corporation's profit margin, it bears note that private prison management has proven an extraordinarily lucrative investment sector,[6] with CCA the strongest market player.[7] CCA's revenue grew 36% in 1995 alone, to more than $207 million. As of March 1, 1996, the aggregate market value of CCA voting stock held by non-affiliates of the Company was $1.3 billion.[8] Indeed, CCA posted the fourth largest gain on the entire New York Stock Exchange in 1995. CCA, *1995 Annual Report to Shareholders* 5.

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[5] To guard against personal factors interfering with the independence of judgment, most government officials labor under rigorous conflict of interest rules. *E.g.*, 28 U.S.C. § 445.

[6] *See, e.g.*, Tom Whitfield, *Making Crime Pay: Corrections Corporation Cashes in on Privatized Prisons*, ATLANTA JOURNAL-CONSTITUTION, Feb. 8, 1996, at E1; Sandra Block, *Everybody's Doin' the Jailhouse Stock*, USA TODAY, June 4, 1996, at 3B; Anthony Ramirez, *Crime-Related Investing May Prove to be a Winner for Some*, NEW YORK TIMES, June 14, 1994, at D8.

[7] CCA states that it is "the leading private sector provider of detention and corrections services to federal, state and local governments," CCA, *1995 Annual Report to Shareholders* ("Corporate Profile"), and that it won "the majority of contracts awarded the private sector in 1995." *Id.* at 3.

[8] CCA, *Form 10-K: Annual Report Pursuant to Section 13 or 15(d) of the Securities Exchange Act of 1934 (for the fiscal year ended Dec. 31, 1995)*, at 1.

Thus, as a purely factual matter, any suggestion that the denial of qualified immunity to private prison guards will sound the death knell for privatized corrections companies like CCA is indefensible.[9]

B. Private Corrections Companies Will Not Be Hindered In Attracting Qualified Candidates Or In Carrying Out Their Functions In The Absence Of Qualified Immunity For Their Employees.

This Court's immunity jurisprudence reflects the understandable concern that those contemplating government service might be deterred by the threat of personal civil liability. *See, e.g., Wood v. Strickland*, 420 U.S. 308, 320 (1975) ("[t]he most capable candidates for school board positions might be deterred from seeking office if heavy burdens upon their private resources from monetary liability were a likely prospect during their tenure"); *Harlow v. Fitzgerald*, 457 U.S. at 814 (describing the potential for "deterrence of able citizens from acceptance of public office" in the absence of some litigation immunity).

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[9] Even in the hypothetical case in which a government contractor operated so close to the margin that the difference between qualified immunity and full § 1983 liability for its employees would spell life or death for the company, governmental immunity should be denied. In *Wyatt*, 504 U.S. at 168, this Court noted that governmental immunities may be necessary in some circumstances "to safeguard government, and thereby to protect the public at large," because government must be able to perform its sovereign functions unimpeded. Private corporations, in contrast, have no obligation to serve any non-shareholder constituency, and may decline entry into any sector where perceived financial risks outweigh expected gains.

It is far-fetched, however, to suggest that qualified candidates will be deterred from seeking employment with CCA by the threat of damages suits. As a for-profit company, CCA can offer a broad array of financial inducements to attract talented candidates that ordinarily are beyond the reach of government: wage premiums, profit-sharing, ESOPs, and, perhaps most importantly of all, insurance. Petitioners admit that CCA is bearing their litigation costs in this case, Pet. Br. 1 n.1, and CCA is free to, and probably does, indemnify its employees for judgments arising out of acts within the scope of their employment. Thus, CCA has ample means to attract and retain qualified employees.[10]

Nor will civil rights litigation hamper CCA's operations. Tennessee law both explicitly forbids private prisons and their insurers from invoking sovereign immunity "in any action arising out of the performance of the contract," Tenn. Code Ann. § 41-24-107(b), and requires private prison operators to carry full liability insurance for civil rights claims. Tenn. Code Ann. § 41-24-107(a) ("no contract for correctional services . . . shall be entered into unless . . . (2) the contractor provides an adequate plan of insurance, specifically including insurance for civil rights claims"). In light of these provisions, CCA no doubt assessed its potential liabilities and took them into account in formulating its bid for the contract to run SCCC. After all, CCA not only voluntarily entered the private prison market, it actively lobbied to wrest control over prisons from the

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[10] Federal employees have no guarantee that either litigation costs or adverse judgments will be paid by the government because the applicable regulations give the Justice Department broad discretion in determining when indemnification is appropriate. *See* 28 C.F.R. § 50.15(c) (1996). Nor, apparently, does Tennessee guarantee state employees indemnification.

State of Tennessee in the first instance. *See* W.J. Cody and Andy D. Bennett, *The Privatization of Correctional Institutions: The Tennessee Experience*, 40 VAND. L. REV. 819, 844-45 (1987) (recounting CCA's efforts to secure a ninety-nine year lease to run Tennessee's prisons, and its "intense lobbying" to secure passage of the legislation authorizing the privatization of Tennessee's prisons).

Given this history, it is hardly surprising that CCA itself has disclaimed any fear that civil rights litigation will interfere with its operations. It has informed its shareholders that "[f]rom a liability standpoint the greatest concern has historically been exposure to civil rights claims," but that these claims pose no problem because "CCA has an insurance program that fully indemnifies it." CCA, *1994 Annual Report to Shareholders* 14. CCA expressed a similarly confident litigation outlook in its Form 10-K filing with the Securities Exchange Commission for 1995 (at 17):

> The Company is currently, and from time to time, subject to claims and suits arising in the ordinary course of business, including claims for damages for personal injuries or for wrongful restriction of, or interference with, inmate privileges. In the opinion of management, the outcome of the proceedings to which it is currently a party will not have a material adverse effect upon its operations or financial condition.

Thus, taking CCA at its word, petitioners' hypothetical fears that prisoner litigation will hinder their employer's operations are without substance.[11]

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[11] Because CCA and similarly situated government contractors can and do insure against the risks of civil rights liability, respondent is mystified by the contention of petitioners and their *amici* that an adverse ruling here "could

(continued...)

In the final analysis, CCA's employees have chosen to work for a company that has voluntarily entered into a long-term contract with the government. Because the absence of qualified immunity for private prison guards will not hamper CCA's ability to attract competent candidates or to run SCCC effectively, this factor too weighs against petitioners.[12]

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[11](...continued)
seriously erode the willingness of the several states, its [sic] political sub-divisions and the federal government to engage private contractors" in prison management. *E.g.*, Pet. Br. 41. Indeed, most states that authorize private prisons also require contractors to obtain insurance. *E.g.*, Ariz. Rev. Stat. § 41-1609.01(M)(2) (1996); Colo. Rev. Stat. § 17-1-202(b) (Supp. 1996); Fla. Stat. Ann. § 957.04(b) (Supp. 1997); La. Rev. Stat. Ann. 39 § 1800.4(E)(3) (Supp. 1997); N.C. Gen. Stat. § 148.37(g) (Supp. 1996); N.M. Stat. Ann. § 33-1-17(D)(3) (Supp. 1996); S.D. Cod. Laws Ann. §§ 24-11-42(4) & (5) (Supp. 1996); Tex. Gov't Code Ann. §§ 495.003(c)(10) & (11) (Supp. 1997); W. Va. Code § 25-5-16(a) (1992); Wyo. Stat. § 7-22-110(a) (1995).

[12] Petitioners' volitional participation in this endeavor places them in a far different position than private parties who, in an isolated instance, are conscripted to perform a government function. This factor distinguishes the situation here from the cases cited by petitioners, Br. 28-29, in which a purely private actor performs an isolated public function at the government's behest. *See, e.g., Warner v. Grand County*, 57 F.3d 962, 965-66 (10th Cir. 1995); *Eagon v. Elk City*, 72 F.3d 1480, 1490 (10th Cir. 1996); *Sherman v. Four County Counseling Ctr.*, 987 F.2d 397, 405-06 (7th Cir. 1993).

C. Privately Employed Prison Guards Should Not Receive Governmental Immunity Since They Are Significantly Less Accountable To The Public Than Government Employees.

This Court's recognition of governmental immunities rests, in part, on the premise that our political system places checks on the exercise of governmental power that ensure accountability and safeguard against violations of law. *Nixon v. Fitzgerald*, 457 U.S. 731 (1982). After deciding that the President has absolute immunity for official acts, the Court in *Nixon* noted that its ruling "will not leave the Nation without sufficient protection against misconduct on the part of the Chief Executive." *Id.* at 757. In addition to the ultimate remedy of impeachment, "there are formal and informal checks on Presidential action," including "constant scrutiny by the press," "[v]igilant oversight by Congress," and "a desire to earn reelection." *Id.*

These constraints have little impact on private corporations like CCA. Accordingly, extension of immunity to private prison guards might be affirmatively dangerous because the one remaining deterrent to the abusive exercise of government power — vigorous judicial oversight — would largely be eliminated. Prison inmates are especially vulnerable to the misuse of governmental power because "the jailhouse . . . door is closed, not open, and . . . there is little, if any, protection [of prisoners] by way of community observation." *Cleavinger v. Saxner*, 474 U.S. 193, 205 (1985). And, as Justice Blackmun remarked in his concurrence in *Hudson v. McMillian*, 503 U.S. 1, 13 (1992), judicial scrutiny is "more valuable" to prisoners than to other members of the public because, by and large, prisoners have been stripped of their franchise. For these reasons, political accountability is a vital prerequisite to a grant of immunity in the prison context. As we now explain, that accountability is lacking here.

1. The political process itself exerts the most obvious discipline on governmental actors' conduct. In a public prison setting, a warden who tolerates abuse of inmates may well lose his or her job because the governor or appointing official fears being held accountable for the warden's acts through adverse press attention, legislative oversight, or even voter response during the next election cycle. While *Nixon v. Fitzgerald* teaches that these constraints are weighty in the public sector, they have almost no force in the private sector, where CCA's primary concern is maintaining its ability to underbid competitors for prison management contracts.

Government officials are also duty-bound to observe the law by their oath of office. This public declaration serves an important normative function:

> Unlike normal tort law, federal and state officials are sworn to uphold the Constitution; violating one's oath may mean a reputation for deceit and unreliability. Certainly a rational actor would avoid this result, if only to avoid a decrease in his or her value as an employee. . . . [S]uch an oath, like a monetary disincentive, can affect the behavior of government officials.

Crawford-El v. Britton, 93 F.3d at 836 (Silberman, J., concurring). Publicly employed prison guards are bound not only by the oath required of all state employees by the Tennessee Constitution, Article X, § 1, but they must also take a special oath of office, pledging that they will "on no occasion, ill treat or abuse any convict under [their] care, beyond the punishment ordered by law, or the rules and regulations of [their] institution." Tenn. Code Ann. § 41-1-103. Violation of the oath "shall be perjury, punishable as in other cases of perjury." *Id.* No oath of office is required of private prison guards under Tennessee law. Indeed, Tenn. Code Ann. § 41-24-111(3) *exempts* private prison contractors from "the provisions governing the appointment,

qualifications, and duties of wardens, superintendents, and other correctional employees."

Public officials are also routinely held accountable by the press and public through access to government records. *Department of Justice v. Reporters Committee*, 489 U.S. 749 (1989). Under Tennessee's open records law, Tenn. Code Ann. § 10-7-503(a), corrections department records are generally available to the public. *See State v. Wigard*, 891 S.W.2d 628 (Tenn. Crim. App. 1994). In contrast, the public has no right of access to records relating to CCA's management of SCCC. While CCA is statutorily required to provide certain information to Tennessee's "select oversight committee on corrections" on a bi-annual basis, Tenn. Code Ann. § 41-24-105, this infrequent government monitoring provides little opportunity for informed debate about private prison operations, and is no substitute for the ability to track measures of prison performance — violence by and against inmates, prison overcrowding, and the like — on an ongoing basis.[13]

2. Government employees frequently play an important role in holding their agencies accountable for misdeeds. As this Court has remarked, "[g]overnment employees are often in the best position to know what ails the agencies for which they work; public debate may gain much from their informed opinions." *Waters v. Churchill*, 114 S. Ct. 1878, 1887 (1994) (plurality opinion). Tennessee, like most states, has developed elaborate civil service rules to ensure that employees are not subjected to adverse personnel actions in retaliation for speaking out on matters of public concern. Tenn. Code Ann. §§ 8-30-326, 328, 331. Fortifying these protections is Tennessee's Public Employee Political

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[13] *See, e.g.*, Nicole B. Casarez, *Furthering the Accountability Principle in Privatized Corrections: The Need for Access to Private Prison Records*, 28 U.MICH. J.L.REF. 249 (1995).

Freedom Act, Tenn. Code Ann. § 8-50-601-04 *et seq.*, a separate part of the Civil Service Act that guarantees government employees the right to communicate with elected public officials "for any job related purpose whatsoever." Tenn. Code Ann. § 50-1-602(a). Public prison guards also have both First Amendment and Due Process rights that insulate them from retribution when they speak out on matters of genuine public concern. *See, e.g., Connick v. Myers*, 461 U.S. 138, 146-47 (1983); *Pickering v. Board of Ed. of Township High School Dist.*, 391 U.S. 563, 568 (1968); *Board of Regents v. Roth*, 408 U.S. 564 (1972).

In marked contrast, Tennessee's Prison Privatization Act explicitly *exempts* private prison guards from the protections their public counterparts enjoy, providing that "Title 8, Chapter 30, relative to civil service, *shall not* apply to employees of a prison contractor." Tenn. Code Ann. § 41-24-111(2) (emphasis added). In addition, employees in Tennessee hold their jobs at their employer's pleasure unless they have a contract for a fixed term of years, and generally have no cause of action for wrongful dismissal. *See Reynolds v. Ozark Motor Lines, Inc.*, 887 S.W.2d 822, 823 (Tenn. 1994). Because they are virtually unprotected from retaliation for speaking out, CCA employees who chose to criticize CCA publicly would do so at their peril.[14]

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[14] Tennessee's general whistleblower statute does forbid an employer from discharging a worker "solely for refusing to participate in, or for refusing to remain silent about, illegal activities." Tenn. Code Ann. § 50-1-304(b). But this provision has been construed narrowly by the courts, which emphasize that, for a plaintiff to state a claim, he must show that his reporting activity was clearly protected by statute or regulation, and that his reporting was the *sole* basis for his discharge. *E.g., Griggs v. Coca Cola Co.*, 909 F. Supp. 1066 (E.D. Tenn. 1995); *Pannell v. Future Now, Inc.*, 895 F. Supp. 196 (W.D. Tenn. 1995).

3. Petitioners and their *amici* do not acknowledge the substantial disparity in accountability between public and private sector actors. Instead, they argue that the marketplace is a sufficient disciplining agent, and suggest that private prison guards perform so competently that there is no cause for concern if they have qualified immunity (which only begs the question why they need immunity). *See, e.g.*, Pet. Br. 43-45. Neither of these contentions can withstand scrutiny.

First, petitioners contend that the desire to "secure and maintain their [employer's] contractual relationship with the State of Tennessee" will induce CCA employees to adhere to "established constitutional norms and legal standards." Pet. Br. 44. This utopian suggestion is belied by, among many possible examples, the widespread and well documented fraud in the defense contracting industry, which, like the private corrections industry, serves an exclusively governmental client and a purely sovereign function — providing for the national defense. If a desire to preserve a lucrative business relationship were sufficient to induce government contractors to comply with the law, market conduct would be entirely self-regulating and abuse non-existent.

Second, petitioners argue that, as an empirical matter, private prisons, in their initial years of operation, have outperformed state prisons, making it safe to assume that there are no significant long-term risks in according private prison employees qualified immunity from suit. Pet. Br. 44-45. Petitioners' empirical premise is questionable, and their selective presentation of data presents a distorted picture of the actual performance record of private corrections corporations to date. In fact, the short-term performance of private prison corporations has been decidedly mixed.[15]

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[15] *See, e.g.*, Pierre Tristam, *Jail Companies Face*

(continued...)

More important, however, is that the long-term viability of prison privatization and the magnitude of the associated risks remain to be seen. Petitioners themselves acknowledge that Tennessee's prison privatization contracts are "unambiguously . . . experimental." Pet. Br. 4. As one commentator cautions:

> We should not . . . be fooled by the "halo effect" — that is, that the first few major experiments will be temporarily attractive because the prison

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[15](...continued)
Problems, THE LEDGER, Apr. 22, 1996, at A1 (stating that as of that date, CCA had 268 pending lawsuits against it, and that between 1991 and 1995, CCA settled 80 cases, paying $2 million for lawsuits involving, *inter alia,* wrongful death, negligent classification resulting in one inmate stabbing another, and violations of constitutional rights); Gary Fields, *Private Prisons Pose Problems,* USA TODAY, Nov. 11, 1996, at 3A (chronicling the problems posed by CCA and other private prison facilities in Texas, where, for example, "[o]ut-of-state inmates who would be housed in maximum-security facilities under Texas guidelines are showing up in minimum- and medium-security private facilities," leading to several escapes); Steven Donziger, *The Prison-Industrial Complex,* WASH. POST, Mar. 17, 1996, at C3 (describing cost-cutting measures at an INS detention facility run by a for-profit corporation, Esmoor Correctional Services, that led to a devastating five-hour riot in June 1995 (CCA has since purchased this facility)); Richard Ford, *Firm Awarded Jail Contract is Accused of Failing Inmates,* THE TIMES (London), Apr. 22, 1993 (describing how in 1988, CCA guards left inmate Rosalyn Bradford, who was suffering from an ectopic pregnancy, screaming in her Tennessee cell for 18 hours before taking her to the hospital).

> administrators, being observed very closely, will be under great pressure to perform. Prison operation is not a short-term business.

Ira P. Robbins, *Privatization of Corrections: Defining the Issues,* 40 VAND. L. REV. 813, 827 (1987). This Court should not dramatically expand the law of immunity based on what petitioners admit is an "experiment."

It is not elevating "form over substance," Pet. Br. 38, to suggest that there are critical differences between public and private prisons and their employees that counsel against extending qualified immunity to private prison guards. For public employees, the democratic political process, and the host of federal and state laws that apply exclusively to government employees and government records, provide structural protections against abusive actions that mitigate the dangers of conferring immunity. Because those structural protections against abuse are largely absent for employees of private, for-profit corrections companies, they should not have the advantage of governmental immunity.[16]

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[16] The ABA's Criminal Justice Section, after detailed study of the legal issues surrounding prison privatization, concluded that "[a] private contractor operating a prison . . . should be prohibited from using immunity defenses, such as sovereign immunity or qualified immunity," to reduce or eliminate liability, because "[p]ermitting a contractor to escape liability would severely undermine the goal of accountability." ABA, *Guidelines Concerning Privatization of Prisons and Jails* ¶7 (Mar. 1989).

D. No Policy Interest Would Be Served By Extending Qualified Immunity To Privately Employed Prison Guards.

As discussed above, there are a number of policy arguments that counsel against conferring qualified immunity on private prison guards. But this case presents more compelling reasons to deny private parties immunity than did *Wyatt*, because here there are no "strong" countervailing policy claims that even arguably support an extension of a governmental immunity to private parties. *Wyatt*, 504 U.S. at 164. In response to *Wyatt*, petitioners and their *amici* point to two additional policy considerations to support their claim to qualified immunity. They first contend that prison guards who rely on presumptively valid laws and rules should not be subjected to § 1983 liability. Second, they argue that qualified immunity is the only way to protect private prison guards from being engulfed in vexatious litigation. These contentions are addressed in turn.

1. *Wyatt* involved a private party who obtained a writ of replevin from a state court judge under a statute subsequently held unconstitutional. This Court ruled that private parties could not invoke qualified immunity even where they claimed reliance on a presumptively valid state law. Although the majority of the Court was unpersuaded that Wyatt's predicament warranted an extension of governmental immunity to a private party, three Justices disagreed:

> The normal presumption that attaches to any law is that society will be benefitted if private parties rely on that law to provide them a remedy . . . . I would have thought it beyond peradventure that there is a strong public interest in encouraging private citizens to rely on valid state laws of which they have no reason to doubt the validity.

504 U.S. at 179-80 (Rehnquist, C.J., dissenting, joined by Souter & Thomas, JJ.).

Here, there is no issue of an "important public interest in permitting ordinary citizens to rely on presumptively valid state laws." To the contrary, McKnight has alleged a knowing and deliberate violation of settled Eighth Amendment standards. Petitioners have made no effort to justify their conduct by reference to any law dictating that prisoners must be shackled at both the hands and feet, let alone one that requires the shackles to remain in place even when it is evident that they are inflicting serious pain and blocking circulation. Nor have petitioners argued that they were unaware of the constraints on their conduct imposed by the Eighth Amendment. *See Farmer v. Brennan*, 114 S. Ct. 1970, 1979 (1994).

Moreover, any prison guard claiming reliance on a presumptively valid state law later found to be unconstitutional would likely be able to rely on a "good faith" defense. The possibility of a good faith defense was "not foreclose[d]" by this Court's decision in *Wyatt*, 504 U.S. at 169, and many circuits have embraced the defense. *See, e.g., Pensky v. Duncan*, 79 F.3d 306, 311 (2d Cir. 1996); *Vector Research, Inc. v. Howard & Howard Attys. P.C.*, 76 F.3d 692, 699 (6th Cir. 1996); *Jordan v. Fox, Rothschild, O'Brien & Frankel*, 20 F.3d 1250, 1276-77 (3d Cir. 1994); *Wyatt v. Cole*, 994 F.2d 1113, 1120 (5th Cir. 1993). In the present case, the Sixth Circuit suggested that "[i]t may be that the appropriate balance to be struck here is to permit the corrections officers to assert a good faith defense, rather than qualified immunity," while noting that this issue was not before it on interlocutory appeal. Pet. App. 19.[17]

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[17] In an Eighth Amendment case alleging "deliberate indifference," like the one at bar, neither qualified immunity

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From a defendant's point of view, a good faith defense should be sufficient, as it fully addresses *amici*'s concern that in cases where "the precise contours of constitutional rights have not been clearly established," well-intentioned private actors, including private prison guards, should not be held liable for taking the "decisive action" circumstances may require. Amicus Br. 2. Further, the good faith defense would provide private prison guards as much protection as *government* law enforcement officers historically received. *See Pierson v. Ray*, 386 U.S. at 557 (noting that police officers had only a "good faith and probable cause" defense to actions for false arrest at common law). On the other hand, from a plaintiff's point of view, a good faith defense is clearly preferable to qualified immunity because it permits discovery to explore the motive and knowledge of a defendant, and thus provides a possibility of recovering damages even where an arguably constitutional act was undertaken with an unconstitutional motive.

Although petitioners and their *amici* suggest that withholding immunity from private prison guards will make them undesirably timid with the exercise of force, *see* Pet. Br. 40; Amicus Br. 22-23, there is little danger of that happening in practice. As this Court's jurisprudence clearly reflects, *see, e.g., Hudson v. McMillian*, prison settings provide few incentives to treat prisoners too leniently, since a prison guard's first concern is typically for his own personal safety, and his second, for maintaining prison discipline. *Compare Imbler v. Pachtman*, 424 U.S. at 438 (White, J., concurring, joined by Brennan & Marshall, JJ.)

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[17](...continued)
nor a good faith defense would shield defendants from some form of discovery relating to state of mind, since the test is a subjective one, turning on whether the defendant "knows of and disregards an excessive risk to inmate health or safety." *Farmer v. Brennan*, 114 S. Ct. at 1979.

(highlighting the need for immunity for prosecutors, who in the absence of immunity have incentives not to bring charges).

2. As a final matter, failure to confer qualified immunity on private prison guards will not, as petitioners and their *amici* suggest, lay them bare to endless rounds of vexatious and burdensome litigation. In addition to the good faith defense available to private § 1983 defendants in many circuits, and the reformulated summary judgment standards that make pre-trial dispositions easier to obtain, *see Wyatt*, 504 U.S. at 171 (Kennedy, J., joined by Scalia, J., concurring), there are federal statutes specifically designed to deter non-meritorious prisoner claims. To begin with, the federal *in forma pauperis* (IFP) statute that governs the claims of most prisoner litigants, 28 U.S.C. § 1915, plays an important role in ensuring that civil rights defendants will not be distracted from their duties — even momentarily — by insubstantial claims. District courts may dismiss any IFP suit *sua sponte* "if satisfied that the action is frivolous or malicious." 28 U.S.C. § 1915(d). The statute accords judges the unusual power to look behind a complaint's factual allegations and dismiss those claims whose factual contentions are clearly fanciful. *Neitzke v. Williams*, 490 U.S. 319, 325 (1989). Here, § 1915 scrutiny resulted in the dismissal of one defendant and the elimination of a claim against petitioners that did not assert an actionable civil rights violation.

The next hurdle that a prisoner-plaintiff must overcome was added by Congress just last year in the Prison Litigation Reform Act, P.L. 104-134, 110 Stat. 1321 (Apr. 26, 1996). This statute was designed to prevent frivolous prisoner filings by, *inter alia*, requiring prisoners seeking IFP status to show that they are virtually asset-less; prohibiting an IFP prisoner from bringing almost all types of civil actions or appeals if the prisoner has already filed multiple frivolous actions or appeals; and allowing any § 1983 defendant to waive the right to reply to any prisoner action without the waiver

constituting an admission of the allegations contained in the complaint. This legislation demonstrates that Congress is aware of, and fully capable of addressing, any systemic problems posed by prisoner litigation. Significantly, however, Congress chose not to bestow a statutory immunity on private prison guards confronted with § 1983 damage suits, even though the Prison Litigation Reform Act dealt in depth with § 1983 actions, the phenomenon of prison privatization was over a decade old when the Act was passed, and this Court's decision in *Wyatt* denying private parties qualified immunity came four years earlier.

Admittedly, Congress has not explicitly rejected the idea of extending qualified immunity to the employees of government contractors, but it surely has not embraced it. Congress has far broader investigatory powers than a court and is, of course, free to confer any immunities it chooses under § 1983, based on whatever balance of interests it deems appropriate. That option warrants judicial restraint here. Petitioners' plea is based solely on policy considerations, and, as this Court said in *Tower v. Glover*, 467 U.S. at 923, "[i]t is for Congress to decide whether § 1983 has become too burdensome . . . and, if so, what remedial act is appropriate."

* * *

In § 1983, Congress assigned the federal courts a central role in ensuring that violations of constitutional rights by state actors were both deterred and redressed. Immunities from civil rights suits significantly thwart Congress' dual purpose, because the impact of an immunity ruling is to throw a case out of court, typically at the pleading stage, simply because the plaintiff cannot establish that the defendant violated a settled constitutional norm. Thus, even intentional acts of misconduct can escape judicial review, and violations of civil rights go uncompensated. Because any immunity ruling effectively short-circuits the judicial process, this Court has recognized immunities for public officials

sparingly. For the reasons set forth above, the Court should be doubly wary of extending governmental immunity to private parties, who have no historical basis for their claim.

CONCLUSION

For the foregoing reasons, the judgment of the Sixth Circuit should be affirmed, and this case remanded to determine whether petitioners violated Ronnie Lee McKnight's Eighth Amendment rights.[18]

Respectfully submitted,

DAVID C. VLADECK
(Counsel of Record)
CLAUDIA POLSKY
MICHAEL E. TANKERSLEY
ALAN B. MORRISON
PUBLIC CITIZEN LITIGATION GROUP
1600 20th Street, N.W.
Washington, D.C. 20009-1001
(202) 588-1000

Attorneys for Respondent
Ronnie Lee McKnight[*]

February 12, 1997

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[18] This case should be remanded even if the Court finds that petitioners are entitled to assert qualified immunity. In that event, McKnight would be entitled to show that petitioners' conduct violated clearly established Eighth Amendment norms.

[*] Counsel wish to acknowledge the research assistance provided by Rémi Abbott Ratliff, a member of the Bar of the State of Texas.

Supreme Court, U.S.
FILED
MAR 3 1997
CLERK

(9)

No. 96-318

In The

Supreme Court of the United States

October Term, 1996

DARYLL RICHARDSON and JOHN WALKER,

Petitioners,

vs.

RONNIE LEE McKNIGHT,

Respondent.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Sixth Circuit

REPLY BRIEF OF PETITIONERS

ROBERT S. CATZ
9 Music Square South
Nashville, TN 37203
(615) 780-3594

CHARLES R. RAY
Counsel of Record
JEFFERY S. FRENSLEY
211 Third Avenue North
Nashville, TN 37201
(615) 256-2111

Counsel for Petitioners

March 3, 1997

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

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PETITIONERS' REPLY BRIEF

ARGUMENT

The petitioners in this case perform exclusive and vital governmental functions under statutory authority granted by the State of Tennessee: the management and operation of correctional facilities and services for individuals convicted of violating the criminal laws of the State of Tennessee. The legal principles that support the application of qualified immunity to public correctional officials employed at prison facilities operated by the Tennessee Department of Corrections itself, similarly require conferring qualified immunity to quasi-public correctional officials employed at prison facilities managed and operated by the Corrections Corporation of America (CCA) by contractual agreement expressly authorized by Tennessee law.

Respondent and his amici rest their arguments on fundamental misapprehensions of the role played by state-contracted entities and the scope and purpose of qualified immunity. Respondent and his amici wholly overlook the indisputable point that the only category of cases at issue here are those in which a state actor has undertaken actions that are "objectively reasonable," measured by clearly established and controlling statutory and constitutional standards; if the actions are not objectively reasonable, there is no qualified immunity.

Each of the several arguments advanced by respondent for why CCA's quasi-public correctional officers should not be given qualified immunity are clearly counter-policy arguments that states and local governments may consider when it discharges government functions.

Consistent with its role interpreting the Civil Rights Act of 1871 and accompanying immunities, the Court should decide immunity with regard to the type of governmental function at issue, not with regard to a state's discretionary decision respecting how a particular governmental function should be carried out, much less the factors emphasized by respondent and his amici, as whether the state has made civil service and whistleblower protection equally applicable to state agents hired by contract.

A. Respondent's reliance on common law as a bar to qualified immunity for private actors performing vital and exclusive governmental functions is misplaced.

Respondent and his amici place great reliance that there is supposedly no historical or common law analogue for a private party enjoying qualified immunity. The respondent argues that the "private" or "public" distinction is the only relevant inquiry without any explanation as to why this is the dispositive issue. Furthermore, respondent and his amici summarily dismiss the functional approach advanced by petitioners as having no bearing on the matter. (Res. Br. 14).

As petitioners note in their opening brief, numerous decisions of this Court uniformly establish that public officials performing vital discretionary executive and administrative functions enjoy qualified immunity from personal liability in the performance of their official duties. (Pet. Br. 21). The ultimate inquiry should rest entirely on how the Court determines whether a particular state actor should be afforded qualified immunity.

Petitioners' argued in their opening brief that the justification for extending qualified immunity here turns on the "functions it protects and serves, not by the persons to whom it attaches." *Forrester v. White*, 484 U.S. 219, 224 (1988).

The following hypothetical illustrates the viability of the functional approach as well as the inanity of the respondent's position: Suppose for fiscal and other policy considerations, a prison contains two separate wings within a larger correctional facility, one wing is managed by the state with state employed correctional officers while the other wing of the facility is managed on a contract basis. Thus, if correctional officers from each wing take precisely the same objectively reasonable actions, the officers in the state run prison wing would be entitled to qualified immunity while the guards in the contract prison wing would not, even though the guards acted out the same correctional functions that gave rise to claims brought by prison inmates under 42 U.S.C. § 1983.

When applying the respondent's argument that status is the determining factor as in the above hypothetical, one can readily see the anomaly. No principle of law or logic either compels, nor supports this bizarre outcome. Qualified immunity advances the effective performance of vital and necessary governmental functions. It is no concern whether the governmental functions actually performed are undertaken by public officials or private parties acting under direct authority of and on behalf of the state such as these petitioners. *West v. Atkins*, 487 U.S. 42 (1988).

The historical basis at common law for qualified immunity from suit for governmental officials was grounded more upon the particular functions performed as opposed to the status distinctions between "public" or "private" actors which is advanced by the respondent. In fact, any justification for extending qualified immunity should in all cases be based solely upon a thoughtful and deliberate examination by the Court of the precise functions performed by state actors seeking to assert and extend the privilege.

Respondents' reliance upon *Wyatt* for the proposition that all private defendants are prohibited from asserting the defense of qualified immunity is simply wrong. Even the *Wyatt* Court considered the functional aspects of the activity in question in reaching its conclusion regarding the application of qualified immunity to the defendants. The Court's decision denying qualified immunity to the defendants in that case turned on "the nexus between the private parties and the historic purposes of qualified immunity [which] is simply too attenuated to justify such an extension of our doctrine of immunity." The decision in *Wyatt* was reached only after full consideration of the public policy grounds for applying qualified immunity to public officials. *Wyatt v. Cole*, 504 U.S. 158, 168 (1992). The reasoning for the Court's decision in *Wyatt* was based upon the fact that the private parties in *Wyatt* were under no legal obligation to act or exercise discretion, nor did their challenged acts further or enhance the public good. *Id*. Those concerns are clearly not implicated with respect to quasi-public correctional officers such as these petitioners.

Unlike the defendants in *Wyatt*, quasi-public correctional officers perform historical and traditional police power functions exclusively reserved to the sovereign and delegated to private state actors only under authority of Tennessee law and contract. Second, there is no doubt that in their capacity as quasi-public correctional officers, petitioners must routinely perform discretionary functions which are identical to those of their state employed counterparts. Third, respondent's conclusion that the petitioners have no interest in or appreciation for the public good is neither supported nor pursuasive. Respondent's approach rests on an unrealistic and myopic view of the distinction between government employees hired directly to perform a governmental function and contract employees hired to perform the same governmental function. Private entities performing vital state public functions as here equally serve and advance the government's interest in operating and managing correctional institutions in accord with constitutional norms and standards. Governments, moreover, are increasingly offering a public service model with lessons from the private sector. See e.g., "Creating a Government That Works Better and Costs Less," report of the National Performance Review (Sept. 7, 1993), page 43 ("We must change the system. We must force our government to put the customer first by injecting the dynamics of the marketplace.").

In sum, the respondent's reliance on *Wyatt* fails to take into account that the *Wyatt* Court considered the functions performed by the defendants and concluded that the nexus between those functions and the historic purposes of qualified immunity was too attenuated and remote to justify extension of the doctrine. *Id*. at 167-68.

Likewise, the respondent and his amici fail to consider the post-*Wyatt* lower court decisions which are discussed at length in our opening brief which distinguish private parties acting in ways directly related to the performance of a myriad of exclusive and discretionary governmental functions in stark contrast to the narrow pursuit of the parochial private functions and interests undertaken by the defendants in *Wyatt*. Thus, it is clear that the application of the functional approach advanced here is both analytically sound and clearly preferred over the approach offered up by the respondent's simplified reliance upon a party's employment status as either "public" or "private."

B. Respondent's purported distinctions between state prisons and state contract prisons is inappositive.

Respondent relies on a series of purported distinctions between public prison guards and quasi-public prison guards which collapse upon close inspection. The attempted distinctions highlight the weakness and speciousness of respondent's policy arguments.

1. *Insurance*

Respondent offers that private contractors may provide liability or indemnity insurance to its employees justifies withholding from these petitioners the availability of the qualified immunity defense. (Res. Br. 22). The fact is that most often state and municipal governments routinely provide insurance to cover litigation costs. While many state and local governments do provide

insurance, the Court has never relied on that fact nor should it here, in considering the application of qualified immunity to these petitioners. Additionally, given the vexatious and unexpected nature of many prisoner lawsuits, it seems implausible that a prospective employee would necessarily contemplate the availability of liability insurance before accepting a position as a correctional officer among the several states or private prison contractors.

2. *Indemnification*

Respondent also asserts that the potential of indemnification of private employees for judgments against them is sufficient to distinguish them from public employees. (Res. Br. 22). Again, respondent's position is without merit insofar as the same is true of the federal, state and local governments. Despite the potential for indemnification of public employees, the Court has never relied on or even suggested that qualified immunity or its interpretation of § 1983 immunity doctrine turns on the availability or existence of indemnification.

3. *Public Accountability*

The respondent and his amici argue that private actors who perform traditional vital and exclusive governmental functions are somehow protected from public scrutiny and accountability. (Res. Br. 25-31). Respondent's position seems to suggest that once a prison contract is awarded, there is no further governmental oversight and no public access to activities of the corporation, much less

means for redress of violations of the law. Again, respondent's argument is contrary to fact and bears little relationship to reality.

Because custodial detention of an individual is an exclusive power reserved to the sovereign subject to limitations embodied in the Due Process Clause of the Fourteenth Amendment, CCA may provide correctional services as a "partner" or "joint venturer" with the Tennessee Department of Corrections. The state has promulgated comprehensive regulations regarding the operation of both state run and state contract prisons. Likewise, Tennessee has established a legislative Oversight Committee on Corrections to whom CCA is required to provide information on a biannual basis. Tenn. Code Ann. § 41-24-105. Additionally, as contained in the numerous citations in the briefs of respondent and his amici, various publications and media sources have consistently reported on the activities of private correctional facilities.

While it is clear from the foregoing that state contract prisons are open to public scrutiny and accountability, respondent nonetheless claims that extending qualified immunity to quasi-public correctional officers will eliminate judicial oversight brings light upon the principle which is discussed above regarding the category of cases at issue here. It is indisputable that the defense is available in only those instances in which the challenged conduct was undertaken by state actors in an objectively reasonable manner, measured by clearly established constitutional norms and standards. In cases where the actors have not acted in an objectively reasonable manner, there will continue to be "vigorous judicial oversight" to deter abuse.

Just as with any other governmental function, each of the branches of government, as well as the public itself, have the opportunity to review the actions of private correctional facilities and respond accordingly. The legislative branch has the authority and power to create the enabling legislation and contracts which are the life blood of private correctional facilities. Moreover, through the exercise of its legislative Oversight Committee on Corrections, the State of Tennessee provides further performance review and exposure to the actions of its contract prison facilities. The Tennessee Department of Corrections is authorized to promulgate regulations under which the private facilities will operate and therefore set the standards just as they do with state operated correctional facilities. In addition, the state and federal courts are still open and available fora by which aggrieved prisoners may assert claims and secure relief for conduct which is objectively unreasonable. Finally, nothing decided here will impede the citizenry's ability to arrive at their own personal conclusions regarding the efficacy of privately run correctional facilities and to convey their conclusions to their elected representatives to make any appropriate or necessary changes or reforms. Thus, it is clear that these petitioners performing exclusive and traditional governmental functions regarding the operation and management of correctional facilities will be subject to the same level of public accountability and scrutiny required of state correctional facilities.

CONCLUSION

In conclusion, petitioners renew their request that this Court hold that quasi-public correctional officers who perform exclusive and vital governmental functions that require the exercise of discretion under contract with the state are entitled to qualified immunity if a government official would have been entitled to the immunity had he performed the same function instead. The respondent's approach to this issue turns upon an inappropriate and unrealistic view of the distinction between government employees hired directly to perform a governmental function and private sector employees contracted to perform essential governmental functions. The respondent and his amici would have this Court launch a wholesale attack on the considered policy choices of state and local governments. Consistent with its role in interpreting the Civil Acts Rights Act of 1871 and accompanying immunities, the Court should continue to decide the availability of the qualified immunity defense with due and appropriate regard given to the type of government function performed rather than upon a party's employment status whether it be "public" or "private".

For all the foregoing reasons, petitioners pray the judgment of the United States Court of Appeals for the Sixth Circuit denying them qualified immunity be reversed and the matter remanded to the district court

with directions to grant the petitioners' motion to dismiss this action.

Respectfully submitted,

ROBERT S. CATZ
9 Music Square South
Nashville, TN 37203
(615) 780-3594

CHARLES R. RAY
Counsel of Record
JEFFERY S. FRENSLEY
211 Third Avenue North
Nashville, TN 37219-8288
(615) 256-2111

Counsel for Petitioners

March 3, 1997

Supreme Ct., U.S.
FILED
FEB 7 1997
CLERK

No. 96-318

In the Supreme Court of the United States

OCTOBER TERM, 1996

DARYLL RICHARDSON, ET AL., PETITIONERS

v.

RONNIE LEE MCKNIGHT

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING RESPONDENT

WALTER DELLINGER
Acting Solicitor General
FRANK W. HUNGER
Assistant Attorney General
SETH P. WAXMAN
Deputy Solicitor General
STEPHEN W. PRESTON
Deputy Assistant Attorney General
CORNELIA T.L. PILLARD
Assistant to the Solicitor General
BARBARA L. HERWIG
JOHN F. DALY
Attorneys
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

37 pp

QUESTION PRESENTED

Whether employees of a for-profit corporation, acting under color of law as prison correctional officers, are entitled to assert qualified immunity as a defense to a constitutional tort action.

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In the Supreme Court of the United States

OCTOBER TERM, 1996

No. 96-318

DARYLL RICHARDSON, ET AL., PETITIONERS

v.

RONNIE LEE MCKNIGHT

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

BRIEF FOR THE
UNITED STATES AS AMICUS CURIAE
SUPPORTING RESPONDENT

INTEREST OF THE UNITED STATES

This case concerns whether private individuals, who are employed by a non-governmental, for-profit corporation that contracts with the State of Tennessee to operate a state correctional facility, may invoke the defense of qualified official immunity when they are sued, under 42 U.S.C. 1983, for constitutional torts. The outcome of this case may have important ramifications for claims made under *Bivens* v. *Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971), against private contractors acting on behalf of the federal government. See

Harlow v. *Fitzgerald*, 457 U.S. 800, 809 (1982) (it would be "untenable to draw a distinction for purposes of immunity law between suits brought against state officials under [42 U.S.C.] § 1983 and suits brought directly under the Constitution against federal officers") (quoting *Butz* v. *Economou*, 438 U.S. 478, 504 (1978)).

As discussed below, federal agencies enter into relationships, both contractual and voluntary, with private parties who may be subject to constitutional tort damage actions. See, *e.g.*, *DeVargas* v. *Mason & Hanger-Silas Mason Co.*, 844 F.2d 714, 720 n.5 (10th Cir. 1988) (collecting cases applying *Bivens* to private persons); *F.E. Trotter, Inc.* v. *Watkins*, 869 F.2d 1312, 1318 & n.3 (9th Cir. 1989) (same). The United States has an interest in ensuring effective deterrence of, and remedies for, unconstitutional conduct by persons acting on its behalf. The United States also has an interest in the ability of volunteers and other private persons under federal government supervision to assist the United States without undue distraction or inhibition.

STATEMENT

Legal requirements unique to government help promote regularity and fairness, but they have also been identified as causes of decreased efficiency and innovation in government as compared with the private sector.[1] In the interests of efficiency and innovation, governments at all levels have increasingly begun to experiment with "privatization" of

[1] See, *e.g.*, D. Osborne & T. Gaebler, *Reinventing Government* 45-47 (1992).

public services.[2] Privatization plans involve varying degrees and types of public oversight. To some extent, however, the objective of privatization is to replace direct governmental administration with private control and greater exposure to market mechanisms.

Governmental entities at all levels have responded to fiscal constraints and expanding prison populations in recent years by experimenting with the privatization of correctional functions. See Pet. Br. 2-7; International City/County Management Association, et al., Amici Br. 3-5. This case raises a question regarding the extent to which qualified official immunity may apply to employees of a for-profit corporation operating a prison that previously had been run by state government.

1. The United States Department of Justice has begun to privatize correctional and detention functions in a variety of ways, some of which are closely analogous to the Tennessee experiment that forms the context for this case. Privatization may help "to alleviate the tension between inevitable growth in the Federal inmate population and prison system while responding to Administration and Congressional initiatives to streamline Government operations." *Matters Relating to the Federal Bureau of Prisons: Hearing Before the Subcomm. on Crime of the House Comm. on the Judiciary*, 104th Cong., 1st Sess. 14 (1995) (remarks of Bureau of Prisons Director

[2] See, *e.g.*, A. Gore, *Common Sense Government, Third Report of the National Performance Review* 77-78, 86-87 (1995); *Matters Relating to the Federal Bureau of Prisons: Hearing Before the Subcomm. on Crime of the House Comm. on the Judiciary*, 104th Cong., 1st Sess. 96 (1995).

Kathleen Hawk). Several components of the United States Department of Justice have engaged in contracts with for-profit corporations to provide correctional or detention services. For example, since the early 1980s, both the Immigration and Naturalization Service (INS) and the United States Marshals Service have contracted with for-profit corporations to run detention facilities. The Bureau of Prisons (BOP) has contracted for the operation of certain facilities, including pretrial detention facilities and halfway houses, and anticipates contracting out more of its facilities in the future. *Id.* at 14, 38. Although BOP has not yet privatized an entire prison facility, the Bureau plans to undertake a 5-year prison privatization demonstration project involving prisons in California. See S. Rep. No. 353, 104th Cong., 2d Sess. 76-77 (1996).[3] In accordance with a bid solicitation BOP issued in November 1996, the contract for the operation of that facility must contain express provisions making the contractor responsible for all claims arising out of its operation of the facility, and requiring the contractor to defend and indemnify the United States and its employees against any such claims. Federal Bureau of Prisons, Request for Proposals No. PCC-0001, § C.1.II.A., at 8-9 (Nov. 27, 1996).

2. Consistent with the recent trend toward experimentation with privatizing correctional functions, the State of Tennessee contracts with for-profit companies to perform certain functions in state-run pris-

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[3] BOP is authorized, pursuant to 18 U.S.C. 3621(b), to enter into arrangements for the detention of prisoners in private or other non-federal correctional facilities. See *Statutory Authority to Contract With the Private Sector for Secure Facilities*, 16 Op. Off. Legal Counsel 75 (1992).

ons, and to take over the general operation of specified state prison facilities. Tennessee law authorizes the state Commissioner of Correction to enter into contracts with private enterprises and sets forth certain requirements regarding those contracts. See Private Prison Contracting Act of 1986, Tenn. Code Ann. §§ 41-24-101 *et seq.* (1990 & Supp. 1996) (*reproduced at* Pet. App. 50-64). The Act specifies the range of "correctional services" to be contracted for, including education and training, recreational and other inmate activities, information systems, food services, and general operation of facilities, including the management and custody of inmates. *Id.* § 41-24-102(2) (1990) (Pet. App. 50). The Act contemplates that independent contractors will exercise the State's police powers over incarcerated individuals; it reserves to the State certain powers, however, including establishment of procedures for calculating release and parole eligibility dates, and approving furlough and work release, as non-delegable state functions. *Id.* §§ 41-24-102(2), 41-24-110 (Pet. App. 50, 59).

The Act holds contractors responsible for the day-to-day operations of the facilities under their control. Prison contractors are not bound by state civil service laws, governmental retirement benefit plans, or laws establishing public employee qualifications. Tenn. Code Ann. § 41-24-111 (1990) (Pet. App. 59-60). They must offer services of quality equal to or better than those the State would otherwise provide, and must do so at a cost no greater than the State's cost of operating a medium or minimum security prison of like design. *Id.* § 41-24-104(c) (Supp. 1996) (Pet. App. 53-54).

The Act provides for general oversight by state officials. For example, the Commissioner of Correc-

tion retains responsibility to monitor contracts and to report at least annually to a select oversight committee of the State Legislature. Tenn. Code Ann. § 41-24-109 (1990) (Pet. App. 59).[4] Evaluation of contractor performance must take into account a range of specified factors, including whether the facilities meet professional standards, the level of staff training, the frequency and nature of complaints against staff, as well as disciplinary actions against inmates and staff. *Id.* § 41-24-105(e) (Pet. App. 55).

Among the requirements the Act places on a contractor is that it "provide[] an adequate plan of insurance, specifically including insurance for civil rights claims." Tenn. Code Ann. § 41-24-107(a)(2) (1990) (Pet. App. 57). Such a plan must be "adequate" to protect the state "from any and all actions by a third party against the contractor or the state as a result of the contract." *Id.* § 41-24-107(a)(2)(A) (Pet. App. 58). The contractor is not expressly required to insure its employees against personal liability, but its insurance must be "adequate to assure the contractor's ability to fulfill its contract with the state in all respects." *Id.* § 41-24-107(a)(2)(C) (Pet. App. 58).[5]

3. Respondent is incarcerated in a Tennessee prison, the South Central Correctional Center, that is run by a for-profit corporation, Corrections Corporation of America (CCA), under contract with the State. Petitioners are two correctional officers employed by CCA. Pet. App. 39-43 (Complaint). Respondent alleges that, while transporting him to the South Central Correctional Center, petitioners intentionally mistreated him in violation of the Eighth Amendment. *Id.* at 44-48. He claims that petitioners used overly tight restraints and taunted him when he complained that the restraints were harming him, and that the restraints caused him serious medical injury that required that he be hospitalized. *Id.* at 45-48.

Respondent sued under 42 U.S.C. 1983, and petitioners moved to dismiss the complaint based on qualified immunity. The district court denied the motion. Pet. App. 23-24. Petitioners took an interlocutory appeal pursuant to *Mitchell* v. *Forsyth*, 472 U.S. 511 (1985).

4. A divided panel of the court of appeals affirmed. Pet. App. 1-22. The court noted that *Wyatt* v. *Cole*, 504 U.S. 158 (1992), held that private parties invoking state garnishment procedures against other private parties are not entitled to qualified immunity against Section 1983 due process claims. The court did not view *Wyatt* as necessarily dispositive, observing that several courts of appeals have distinguished *Wyatt* and applied qualified immunity to private parties who acted under color of law to serve public, as opposed to private, interests. Pet. App. 9-12 (citing *Eagon* v. *Elk City*, 72 F.3d 1480 (10th Cir. 1996); *Warner* v. *Grand County*, 57 F.3d 962 (10th Cir. 1995); *Sherman* v. *Four County Counseling Ctr.*, 987 F.2d 397 (7th Cir. 1993); *Frazier* v. *Bailey*, 957 F.2d 920, 928 (1st Cir. 1992)).

The court concluded, however, that petitioners could not invoke qualified immunity because, "as employees of a private corporation seeking to maximize

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[4] The statute calls for an initial contract term of three years, "in order to allow the contractor sufficient time to demonstrate its performance," and for evaluation by legislative committees at the end of the second year, before renewal of any contract. Tenn. Code Ann. § 41-24-105 (Supp. 1996) (Pet. App. 54-56).

[5] The Act also specifically denies the contractor the protection of state sovereign immunity. Tenn. Code Ann. § 41-24-107(b) (1990) (Pet. App. 58).

profits, correctional officers act, at least in part, out of a desire to maintain the profitability of the corporation." Pet. App. 15. The profit motive "upsets the balance qualified immunity seeks to establish," which, "at least implicitly, contemplates a government actor acting for the good of the state, not a private actor acting for the good of the pocketbook." *Id.* at 16. Turning over prison management to a for-profit corporation presents an "increased threat of injury by violation of constitutional guarantees," making qualified immunity for the corporation's employees inappropriate. *Ibid.*

Judge Nelson concurred in the judgment. He questioned the majority's reasoning that there is "a meaningful difference between the behavior of a correctional officer whose paycheck comes from the State of Tennessee and the behavior of a correctional officer whose paycheck comes from the Corrections Corporation of America." Pet. App. 20. He believed the result was controlled, however, by *Duncan* v. *Peck*, 844 F.2d 1261 (6th Cir. 1988), which he viewed as categorically rejecting qualified immunity for private defendants. Pet. App. 20-21.

SUMMARY OF ARGUMENT

Petitioners are state actors for purposes of constitutional damages liability under 42 U.S.C. 1983, but, under the reasoning of *Wyatt* v. *Cole*, 504 U.S. 158 (1992), and the principles of qualified immunity this Court has developed, we do not believe they should be afforded qualified immunity.

We do not read *Wyatt* as foreclosing extensions of qualified immunity in appropriate circumstances to private individuals who act on the public's behalf. The defendants in *Wyatt* were private persons who

violated due process by enforcing a personal debt through unconstitutional state replevin procedures. In denying them qualified immunity, the Court relied on the fact that they were pursuing private rather than public interests.

In our view, service in the public interest is a necessary but not sufficient predicate for extension of qualified immunity to private individuals. Although petitioners here are pursuing a public function in operating the state prison, they are also employees of a for-profit corporation, and they are not subject to direct or substantial supervision by government employees. As the court of appeals correctly recognized, there is an "increased threat of injury by violation of constitutional guarantees" where governmental authority is wielded by persons answerable principally to a for-profit enterprise rather than to a government entity. Pet. App. 16.

Under this Court's qualified immunity doctrine, immunity is unwarranted here for two principal reasons. First, whereas qualified immunity is needed to protect the decisive and forceful execution of public duties and to ensure the government's ability to attract qualified persons to public service, corporations such as petitioners' employer can use market mechanisms not equally available to government to serve the same ends. By offering increased compensation, insurance, or promises of indemnification, for-profit corporations generally can—without the benefit of qualified immunity—protect their employees from inhibitions caused by the risk of individual damages liability for violation of new or unclear constitutional norms. Government, in contrast, is constrained from providing public officials the same

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degree of protection through contractual arrangements.

Second, application of qualified immunity to bar recovery for constitutional violations is tolerable because government is subject to additional checks against unconstitutional behavior that are absent from the private sector. Public employees have reason to comply with the Constitution, not only because of the deterrent effect of potential damages liability, but because adherence to constitutional rights is part of public employees' mission. Governmental systems of support and accountability seek to ensure that public employees have the training, resources, and incentives to recognize and respect constitutional rights. When corporate employees, such as petitioners, act under the pressures of profit maximization and without direct or substantial supervision by government officials, however, they lack the benefit of those public-sector checks.

Although petitioners are not, in our view, entitled to qualified immunity, the analysis we propose takes into account that in other circumstances there may well be private persons, subject to constitutional tort liability, whose conduct on behalf of the public should be protected by official immunity. Persons such as private physicians under contract to provide medical care to prison inmates, private security officers temporarily deputized by and working under the oversight of the United States Marshal, private citizens cooperating voluntarily with law enforcement, and others who are subject to direct or substantial governmental supervision may require the protections of qualified immunity in order effectively to serve in the public interest. The Court should thus take care to preserve the opportunity for private

individuals acting on behalf of government to seek the protections of qualified immunity in appropriate future cases.

ARGUMENT

EMPLOYEES OF A FOR-PROFIT PRISON MANAGEMENT COMPANY, WHO ARE NOT SUBJECT TO DIRECT OR SUBSTANTIAL GOVERNMENTAL SUPERVISION, SHOULD NOT BE ENTITLED TO INVOKE A QUALIFIED IMMUNITY DEFENSE TO A PRISONER'S CONSTITUTIONAL TORT CLAIM

As petitioners acknowledge (Pet. Br. 14-20), their challenged conduct was action under color of state law for purposes of 42 U.S.C. 1983. Petitioners' authority to confine and transport respondent derived from Tennessee law and the contract between the State and petitioners' employer, the Corrections Corporation of America (CCA). Their authority over respondent thus was "possessed by virtue of state law and made possible only because [they are] clothed with the authority of state law." *West* v. *Atkins*, 487 U.S. 42, 49 (1988) (quoting *United States* v. *Classic*, 313 U.S. 299, 326 (1941)).

If petitioners had been employees of the State of Tennessee, working in a state-run institution, they would have been entitled to assert qualified immunity. See generally *Procunier* v. *Navarette*, 434 U.S. 555 (1978) (state prison officials entitled to qualified immunity).[6] The question here is whether peti-

[6] That government employees would be entitled to invoke qualified immunity does not mean that they would necessarily be immune from a claim such as respondent's. The courts below denied immunity on the basis of petitioners' status as non-governmental employees; it did not reach the question whether the alleged conduct violated "clearly established

tioners, who are subject to liability for constitutional torts, are also entitled to invoke the defense of qualified official immunity. That question should not be answered categorically for all private persons, but should depend on whether, in a particular circumstance, applying qualified immunity would serve the doctrine's purposes. Immunities should not lightly be extended, and persons "who seek exemption from personal liability have the burden of showing that such an exemption is justified by overriding concerns of public policy." *Forrester* v. *White*, 484 U.S. 219, 224 (1988); see *Butz* v. *Economou*, 438 U.S. 478, 506 (1978).

This Court has rejected the notion that private persons deemed to have engaged in "state action" are, simply by virtue of the state-action determination, entitled to assert qualified immunity. *Wyatt* v. *Cole*, 504 U.S. 158 (1992). The applicability of qualified immunity depends on "the special policy concerns involved in suing government officials." *Id.* at 167. Qualified immunity is designed to protect public employees' ability to act forcefully and decisively in the public interest, and to ensure that able persons are not deterred from public service. *Mitchell* v. *Forsyth*, 472 U.S. 511, 525-526 (1985); *Harlow* v. *Fitzgerald*, 457 U.S. 800, 816 (1982).

We do not believe the rationales supporting qualified immunity in appropriate circumstances warrant extending it to petitioners in this case. Tennessee has turned over the day-to-day operation of its South Central Correctional Center to a for-profit corporation, relying chiefly on private contractual mecha-

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statutory or constitutional rights of which a reasonable person would have known." See *Harlow* v. *Fitzgerald*, 457 U.S. 800, 818 (1982).

nisms rather than governmental institutional safeguards to protect the interests qualified immunity is designed to serve. Extension of qualified immunity in these circumstances appears neither necessary to satisfy the concerns articulated in *Mitchell* and *Harlow*, nor appropriate in light of the absence of important government safeguards.

The Court should affirm the decision of the court of appeals on the ground that qualified immunity should not be extended to guards of a prison run by a for-profit corporation who lack direct or substantial supervision by government officials. The Court should not, however, foreclose the application of qualified immunity in other contexts to private persons not employed by government. When private persons performing governmental functions work under more direct governmental supervision, or in circumstances in which they cannot realistically rely on private insurance or indemnification to protect them from personal liability for violations of new or unclear constitutional standards, they may well be justified in claiming qualified immunity.

A. This Court's Prior Rulings Do Not Resolve The Question Presented

Both petitioners and respondent have suggested—incorrectly in our view—that prior decisions of this Court provide a ready answer to the issue presented in this case. Respondent, for example, suggests that this Court has already considered in *Wyatt* v. *Cole*, *supra*, whether there are any private persons subject to constitutional tort claims who may invoke official immunity, and "answered that question in the negative." Br. in Opp. 5. *Wyatt*, however, addressed the inapplicability of qualified immunity to a private individual and his attorney who enforced a private debt by

invoking a state replevin procedure that was later declared to violate due process. 504 U.S. at 159-160. The Court relied on the fact that such persons are not "principally concerned with enhancing the public good," *id.* at 168, but are pursuing wholly private, financial interests. Because, as *Wyatt* held, qualified immunity is designed "to safeguard government," not to benefit the individuals to whom it applies, *ibid.*, it was inapplicable there. In ruling that the parties before it could not invoke qualified immunity, however, the Court noted that the question decided was a "very narrow one," and that the "precise issue encompassed" only the availability of immunity "for private defendants faced with § 1983 liability for invoking a state replevin, garnishment, or attachment statute." *Id.* at 168-169.

Following *Wyatt*, a number of courts of appeals have drawn a distinction between private persons acting in self-interest and those who are, pursuant to some arrangement with a governmental entity, fulfilling a public duty or function. See, *e.g.*, *Eagon* v. *Elk City*, 72 F.3d 1480, 1489-1490 (10th Cir. 1996) (private member of nonprofit historical society administering public event in city park was not invoking state law in pursuit of private ends, and was thus entitled to qualified immunity against First Amendment claim by group denied permission on political grounds to participate in event); *Warner* v. *Grand County*, 57 F.3d 962, 964-967 (10th Cir. 1995) (female director of private crisis center who carried out strip search of female suspect at request of male police officers acted as "an 'auxiliary' to police search procedures" in an effort to minimize intrusiveness of search and was entitled to qualified immunity); *Williams* v. *O'Leary*, 55 F.3d 320, 323-324 (7th Cir.) (private physician under

contract to provide medical care to prisoners was entitled to qualified immunity), cert. denied, 116 S. Ct. 527 (1995); see also *Sherman* v. *Four County Counseling Ctr.*, 987 F.2d 397, 406 (7th Cir. 1993) (private psychiatric facility entitled to qualified immunity against Fourth Amendment claims based on center's assessment of putatively dangerous individual at request of police, and detention of individual pursuant to court order); cf. *Burrell* v. *Board of Trustees*, 970 F.2d 785, 796 (11th Cir. 1992) (denying qualified immunity to private persons conspiring with public officials for the purpose of infringing constitutional rights, but distinguishing cases in which private persons assumed public duties for public purposes), cert. denied, 507 U.S. 1018 (1993). Indeed, the court below also recognized the potential difference between *Wyatt* and cases involving private persons using governmental authority to serve the public. Pet. App. 8-9.

For their part, petitioners mistakenly assert that this Court's "functional" approach to immunity dictates application of qualified immunity in their favor. See, *e.g.*, Pet. Br. 22-23, 36-38. The Court, however, has used a functional approach principally to determine what degree of immunity applies—absolute or qualified. The Court has held that absolute immunity applies not to particular officials, but to the performance of judicial, prosecutorial, or other "functions." See, *e.g.*, *Harlow*, 457 U.S. at 812-813; *Cleavinger* v. *Saxner*, 474 U.S. 193, 201 (1985); *Forrester*, 484 U.S. at 224. The Court has not, however, extended official immunity to non-governmental personnel simply because they performed public functions. Thus, this Court's prior rulings do not provide a categorical answer to the question presented.

B. The Policies Justifying Qualified Immunity Do Not Support Extending It To Petitioners

Despite the fact that 42 U.S.C. 1983 "on its face admits of no immunities," *Imbler* v. *Pachtman*, 424 U.S. 409, 417 (1976), this Court has accorded immunity to a wide range of government officials, where a "tradition of immunity was so firmly rooted in the common law and was supported by such strong policy reasons that 'Congress would have specifically so provided had it wished to abolish the doctrine.'" *Owen* v. *City of Independence*, 445 U.S. 622, 637 (1980) (quoting *Pierson* v. *Ray*, 386 U.S. 547, 555 (1967)). The policy reasons for recognizing official immunity are aimed at "protecting government's ability to perform its traditional functions." *Wyatt*, 504 U.S. at 167-168. In delimiting the bounds of the official immunity doctrine, this Court has consistently endeavored to strike a proper balance between the risks that officials will be inhibited in public service by their fear of personal liability, and the countervailing need to maintain incentives for persons entrusted with governmental power not to abuse it and to provide compensation to those who have been injured by unconstitutional official conduct. *Harlow*, 457 U.S. at 819; *Wyatt*, 504 U.S. at 167.

1. *Private corporations, including petitioners' employer, have alternative means, not equally available to governmental employers, to attract able employees and to protect their exercise of discretion on the job*

Qualified immunity responds to the concern that individuals, faced with the risk of constitutional claims against them in their personal capacity, will be distracted by their private interests in avoiding suit and thus will not fully pursue the public duties they

were hired to perform. The Court has identified three related risks posed by baseless litigation against public officials: "distraction of officials from their governmental duties, inhibition of discretionary action, and deterrence of able people from public service." *Harlow*, 457 U.S. at 816. Concern over personal liability may "dampen the ardor of all but the most resolute, or the most irresponsible [public officials], in the unflinching discharge of their duties." *Id.* at 814 (quoting *Gregoire* v. *Biddle*, 177 F.2d 579, 581 (2d Cir. 1949) (L. Hand, J.), cert. denied, 339 U.S. 949 (1950)). Qualified immunity accordingly seeks to assuage public employees' concerns about litigation by immunizing them from personal liability for damages for constitutional violations, except where they allegedly violate "clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow*, 457 U.S. at 818. Qualified immunity provides a defense against litigation as well as liability; it is to be applied as early as possible in a lawsuit, *Anderson* v. *Creighton*, 483 U.S. 635, 646 n.6 (1987), and interlocutory orders denying qualified immunity may be immediately appealed, *Behrens* v. *Pelletier*, 116 S. Ct. 834 (1996); *Mitchell* v. *Forsyth*, *supra*.

The risk of personal liability may adversely affect private as well as public employees—particularly where, as here, private employees are performing the same functions fulfilled in government institutions by public employees. There are, however, alternative mechanisms available to private corporate employers to serve the same policy goals that qualified immunity serves for public employees. A private-sector employer can ameliorate excessive timidity caused by employees' fears of personal liability by offering them

appropriate incentives, such as liability insurance, promises of legal representation, or indemnification for adverse judgments.[7] Private corporations that perform governmental functions, and thereby are subject to the Constitution, can use such tools to ensure that their employees are neither too cautious in their execution of their duties nor inattentive to established constitutional rights. Although insurance against constitutional tort liability, or offers of indemnification or other enhanced compensation, add costs to corporate performance of public functions, those costs can be taken into account in bidding on contracts to perform such functions. Moreover, as the court of appeals recognized, the additional expense to government, if any, may be offset by decreased management and oversight costs. Pet. App. 17.

In this case, private market mechanisms presumably were available to petitioners' employer, CCA, to protect against the adverse effects that the risk of personal liability might have on the willingness of qualified persons to work for CCA and on CCA employees' ability to function in their jobs. It appears that the contract between CCA and the State contemplated that CCA would undertake to accept the costs associated with shielding its employees from undue burdens of constitutional tort litigation. Tennessee law specifically requires that contractors

[7] See, *e.g.*, Del. Code Ann. tit. 8, § 145 (Michie 1991) (authorizing corporation's indemnification of its personnel against legal expenses, judgments, fines and reasonable settlements); *Waltuch* v. *Conticommodity Servs., Inc.*, 88 F.3d 87, 89-95 (2d Cir. 1996) (interpreting Section 145 of Title 8 of the Delaware Code to limit allowable corporate indemnification to good-faith conduct).

performing correctional functions insure against liability for "civil rights claims." Tenn. Code Ann. § 41-24-107(a)(2) (1990) (Pet. App. 57). The contractor's insurance must be "adequate to assure the contractor's ability to fulfill its contract with the state in all respects." *Id.* § 41-24-107(a)(2)(C) (Pet. App. 58).

While private corporations have broad latitude to provide advance guarantees of indemnification to their officers, directors, employees, and agents, and unilaterally to set compensation at levels adequate to attract qualified employees, government is more limited in its freedom to do so. At the federal level, government employees' salaries are set under a detailed statutory scheme. See generally 5 U.S.C. 5301-5392. The government has only a limited ability to indemnify its employees for constitutional tort liability and is unable to promise in advance to indemnify employees for judgments of unknown magnitude.

The United States Department of Justice, for example, provides by regulation that it "may" indemnify an employee for an adverse judgment or settlement, where "such indemnification is in the interest of the United States, as determined by the Attorney General or his designee." 28 C.F.R. 50.15(c)(1) and (2).[8]

[8] Other agencies have similar indemnification provisions. See, *e.g.*, 13 C.F.R. 114.110 (Small Business Admin.); 14 C.F.R. 1261.316 (Nat'l Aeronautics and Space Admin.); 17 C.F.R. 142.1-142.2 (Commodity Futures Trading Comm'n); 22 C.F.R. 21.1 (Dep't of State); 22 C.F.R. 207.01 (Agency for Int'l Dev.); 31 C.F.R. 3.30 (Treasury); 32 C.F.R. 516.32 (Army, Dep't of Defense); 34 C.F.R. 60.1-60.2 (Education); 38 C.F.R. 14.514(c) (Veteran's Affairs); 43 C.F.R. 22.6 (Interior); 45 C.F.R. 36.1 (Health and Human Servs.).

Indemnification decisions are discretionary, and, absent extraordinary circumstances, they are made only after litigation is completed. *Id.* § 50.15(c)(1), (3) and (4). Moreover, such indemnification must be paid out of agency appropriations rather than out of the judgment fund established for liability against the United States, *Indemnification of Department of Justice Employees*, 10 Op. Off. Legal Counsel 6, 8-9 (1986); 31 U.S.C. 1304, and any payment is "contingent upon the availability of appropriated funds of the employing component of the Department of Justice." 28 C.F.R. 50.15(c)(5). An advance commitment to provide unlimited indemnification would likely run afoul of the Anti-Deficiency Act, 31 U.S.C. 1341(a)(1)(A), which forbids the obligation of funds not already appropriated, and the Adequacy of Appropriations Act, 41 U.S.C. 11(a), which forbids the government to obligate itself by contract "unless the same is authorized by law or is under an appropriation adequate to its fulfillment." See *Indemnification Agreements and The Anti-Deficiency Act*, 8 Op. Off. Legal Counsel 94 (1984); *Proposed Indemnification of Department of the Treasury Officers and Employees*, 15 Op. Off. Legal Counsel 70, 78 (1991). Insofar as insurance against personal liability is concerned, Congress has recently authorized payments limited to one-half of the costs of professional liability insurance for agency law enforcement officers and supervisory or management officials. Omnibus Consolidated Appropriations Act of 1997, Pub. L. No. 104-208, Tit. VI, § 636, 110 Stat. 3009 [1080-1083 (enrolled

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States also have programs for indemnification of their employees. See 5 F. Harper, F. James & O. Gray, *Law of Torts* § 29.9, at 664 n.20 (2d ed. 1986).

version)] (*reproduced at* 142 Cong. Rec. H11,741 (daily ed. Sept. 28, 1996)). Those payments must be drawn from amounts appropriated for agency salaries and expenses. *Ibid.* In sum, federal government indemnification and insurance of official constitutional tortfeasors is limited and contingent; the government's indemnification programs do not—and cannot—"make reimbursement sufficiently certain and generally available to justify reconsideration of the balance struck in *Harlow* and subsequent cases." *Anderson*, 483 U.S. at 642 n.3. In contrast, the greater flexibility of a corporate employer such as CCA to provide indemnification, insurance, or other compensation to counterbalance the inhibiting effects of constitutional tort liability supports a refusal to extend *Harlow* to petitioners.

2. ***Government employees are deterred from violating constitutional rights by factors not equally applicable to employees of for-profit corporations who are not subject to direct or substantial governmental supervision***

A decision not to extend qualified immunity is particularly appropriate here, where CCA employees are not subject to substantial or direct supervision by public officials. Although affording qualified immunity to public employees results in denial of compensation for some constitutional torts, and therefore decreases the general deterrent effect of damages liability, that decrease is tolerable in part because alternative systems of public accountability create additional incentives for government to minimize constitutional lawbreaking. Those incentives are diluted in the private context.

Constitutional compliance is a core mission of government, and that is a key characteristic that distin-

guishes government from the private sector. In the public sector, decisions about professional recognition and promotion are based not on employees' contribution to the profitability of the entity, but on a wider range of factors that may place less pressure on individuals to cut constitutional corners. In order to ensure regularity of decisionmaking and to maximize accountability, public institutions are highly structured, with employees organized in clear hierarchies. Every federal employee is specifically required by federal law to take an oath to uphold the Constitution of the United States, as are all "executive officers" of the States. 5 U.S.C. 3331; 4 U.S.C. 101. Federal employees' duties are generally governed by detailed rules and regulations. See, *e.g.*, 28 C.F.R. Pts. 500-572 (BOP regulations). Public employees are also trained to know the constitutional rules that apply to their fields of work, and, consistent with that training, this Court presumes that they know the law. See *Harlow*, 457 U.S. at 818-819. Governmental entities are ultimately responsible to the public through the political process: The highest level Executive Branch officials are subject to Senate confirmation, and Congress can also control agency action by legislation and by ongoing legislative oversight. For all these reasons government employees generally have the commitment and incentives to comply with constitutional norms, notwithstanding that qualified immunity might decrease the general deterrent force of constitutional tort litigation against them.

Where governmental functions are carried out by employees of a for-profit corporation without direct or substantial supervision by government employees, the public safeguards that minimize constitutional violations are attenuated. As the court of appeals

recognized, corporations and their employees are motivated to seek to maximize profits. See Pet. App. 15. One need not assume improper purposes on the part of such employees to recognize that the profit motive distinguishes them from employees of governmental institutions. In the corporate setting, decisions about how much training to provide, for example, and how to design institutional procedures, are driven by cost concerns, creating circumstances in which the risks of constitutional violations might be higher than they are where government is in charge. Specifically, to the extent that qualified immunity decreases the exposure of a workforce to constitutional tort liability, it makes lawbreaking less expensive—thereby decreasing incentives for a profit-making institution to devote resources to avoid constitutional torts in the first place. Thus, the availability of qualified immunity may decrease the level of corporate resources allocated to educating and training employees to recognize and avoid constitutional violations, and may cause less to be spent on establishing routines, policies, and disciplinary structures to minimize unconstitutional action by its employees. The court of appeals correctly identified an "increased threat of injury by violation of constitutional guarantees" where governmental authority is wielded by persons answerable principally to a private, profit-making enterprise rather than to a government entity. *Id.* at 16.

The absence of direct governmental supervision of CCA's employees "counsels against granting qualified immunity" to petitioners in this case. Pet. App. 16. The CCA contract with Tennessee appears to be a "turn-key" type of contract, under which CCA rather than the State is responsible for running the prison.

Tennessee law authorizes the operation of an entire medium-security or minimum-security facility under a single contract, and petitioners state that CCA now operates several of the State's prisons. See Tenn. Code Ann. § 41-24-103(c) (Supp. 1996) (Pet. App. 51); Pet. Br. 7. To be sure, the State retains ultimate control of the prisons, both through monitoring by its Commissioner of Correction and by periodic evaluation by pertinent committees of the state legislature. See Tenn. Code Ann. §§ 41-24-105, 41-24-109 (1990 & Supp. 1996) (Pet. App. 54, 59). There is, however, no requirement—or evidence—of direct or substantial state supervision of the contractor's activities.

A cautious approach to expanding qualified immunity here is particularly warranted because prison privatization is a social experiment that is still in its early stages. The ability of contractors to perform efficiently while safeguarding constitutional rights is as yet unproven. Maintaining strong incentives for adherence to constitutional principles—such as those provided by the prospect of civil litigation—should enhance prospects for the continued success of such experiments.[9] Accordingly, based on all of the foregoing considerations, the balance weighs against extending qualified immunity to petitioners.

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[9] Petitioners contend that, as a factual matter, CCA and other prison contractors have a good record to date on adherence to constitutional constraints. Pet. Br. 43-45; see also International City/County Management Association, et al., Amici Br. 19-25. That attempt to make immunity turn on an empirical inquiry into contractor performance misses the point, both because it ignores fundamental structural and legal differences between public and private organizations, and because prison privatization is still in its experimental stages, with a very limited track record.

C. Some Private Individuals Acting On Government's Behalf Under Direct Or Substantial Government Supervision May Well Be Entitled To Invoke Qualified Immunity

Although petitioners are not, in our view, entitled to invoke qualified immunity, the Court should refrain from holding categorically that private constitutional tort defendants may never be protected by qualified immunity. The key factors that make qualified immunity inappropriate here are the availability of market mechanisms to protect CCA employees from concerns about constitutional liability that might unduly inhibit them from boldly executing their duties, and the absence of sufficient governmental supervision over the actions in question to ensure that, if qualified immunity were extended, meaningful safeguards against constitutional violations would remain. In other contexts, however, the absence of one or both of those factors may indeed support extension of qualified immunity to private individuals acting on behalf of the government.

1. For example, while some physicians who provide medical services to inmates are government employees, others provide such services on a contract basis. Regardless of their status, however, prison physicians may become the target of Eighth Amendment damage suits, on the theory that their actions amounted to "deliberate indifference" to the prisoner's condition. See, *e.g.*, *McCarthy* v. *Madigan*, 503 U.S. 140 (1992). When such suits are brought against physicians who provide services in prisons on a contract basis, qualified immunity should protect them because neither of the factors that counsels the result we advocate here would apply. The accountability of medical personnel to public officials affords

strong institutional safeguards against constitutional violations, and, in light of such safeguards, the "increased threat" of constitutional injury so important to the analysis of petitioners' immunity claims (see Pet. App. 16) is absent. Moreover, the difficulties and costs faced by individual physicians in obtaining private constitutional-tort liability insurance may be considerable. If performing contract work for government subjects them to the possibility of baseless Eighth Amendment litigation without the prospect of immunity, then capable physicians may well shun such work in favor of other work that does not pose such risks. Under these circumstances, we believe the balance of *Harlow* factors would weigh in favor of extending immunity.

2. Contractors who might be subjected to constitutional tort claims simply for carrying out instructions given by government officials should also be entitled to invoke qualified immunity. An example of contract personnel for whom qualified immunity might be available are court security officers that work for the United States Marshals Service under contracts with private security companies. Although such officers are not public employees, they work, for example, in federal courthouses, subject to the oversight of United States Marshals.[10] In the event that a United States Marshal directed heightened security on a particular day, requiring a contract officer to perform a search that led to a Fourth Amendment deprivation claim, the fact that the contract officer's actions were taken under federal

[10] Contract officers of the Marshals Service are deputized while on duty. See General Accounting Office Report, *Federal Judicial Security*, GAO/GGD-94-112, at 64-65 (1994).

officials' direction would support that officer's invocation of qualified immunity. Those circumstances provide a substantial safeguard against constitutional violations.

In general, federal government contracting regulations authorize agencies in certain circumstances to enter into employment-like contracts with non-employees, under which contractors are subject to day-to-day supervision and control by government employees. 48 C.F.R. 37.101, 37.104(c)(2). Such contracts must be specifically statutorily authorized, because "[t]he Government is normally required to obtain its employees by direct hire under competitive appointment or other procedures required by the civil service laws." 48 C.F.R. 37.104(a). Persons working for the government under such contracts may be entitled, if they are sued for alleged constitutional violations, to invoke qualified immunity.

3. Private citizens may also be subject to constitutional tort actions when they cooperate voluntarily with governmental activities at the request and under the direction of governmental officials, and in those circumstances, too, private individuals should be able to invoke qualified immunity.[11] For example, federal law enforcement agencies frequently enlist the aid of private citizens or corporate entities to provide "backstopping" for undercover operations. "Backstopping" refers to the practice of officials of financial institutions vouching for the existence and credit history of fictitious business enterprises that are used by federal agents as part of law enforcement

[11] Some of the court of appeals cases distinguishing *Wyatt* and applying qualified immunity to private persons have involved volunteers. See, *e.g.*, *Eagon*, *supra*; *Warner*, *supra*.

operations. The targets of such investigations might sue the volunteers as well as the federal agents under *Bivens*.[12]

Such volunteers generally have a limited role in an investigation and act under the guidance of law enforcement personnel. Accordingly, as in the previous examples, supervision by government employees safeguards against constitutional infringements. The fact that such persons are cooperating voluntarily also supports extending qualified immunity to them, because the risk of personal liability could otherwise deter able citizens from assisting government in the absence of any compensation whatsoever to offset that risk. Here again, contractual mechanisms to protect against baseless litigation are not practically available.

4. Employees of private regulatory or standards-enforcement organizations acting under specific statutory mandates may also warrant official immunity protections. For example, Congress has directed that the Medicare program make use of private Peer Review Organizations (PROs) to review the quality and appropriateness of medical services provided to Medicare beneficiaries. See 42 U.S.C. 1320c *et seq.* Where members of a PRO determine that a Medicare provider has acted in violation of the pertinent standards, they report that conclusion to federal officials, with a recommendation of sanctions. Targets

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[12] An example of such a case currently pending is *Brown* v. *NationsBank*, Civ. No. G-96-112 (S.D. Tex.). Private citizens acting as informants to law enforcement officials have also been named as *Bivens* defendants. See, *e.g.*, *Wang* v. *United States*, 947 F.2d 1400 (9th Cir. 1991); *Beard* v. *O'Neal*, 728 F.2d 894 (7th Cir.), cert. denied, 469 U.S. 825 (1984).

of PRO recommendations have raised constitutional claims against medical professionals who participate in peer reviews. See, *e.g.*, *Kwoun* v. *Southeast Missouri Professional Standards Review Org.*, 811 F.2d 401 (8th Cir. 1987), cert. denied, 486 U.S. 1022 (1988). Because peer review involves prosecutorial and adjudicative functions carried out under color of law, courts have accorded absolute immunity even to private persons who act as reviewers. *Id.* at 407-408; see *Wood* v. *Freedman*, 947 F.2d 948 (Table), 1991 WL 222150 (7th Cir. 1991), cert. denied, 505 U.S. 1206 (1992); see also *Austin Mun. Sec.* v. *National Ass'n of Sec. Dealers*, 757 F.2d 676 (5th Cir. 1985) (extending immunity to members of association of securities dealers acting under federal statutory authority); *Clulow* v. *Oklahoma*, 700 F.2d 1291, 1298 (10th Cir. 1983) (extending immunity to official of state bar association acting under the rules of state supreme court). Under our analysis, those holdings should not be affected by denial of petitioners' claim of qualified immunity.

* * * * *

Although this case presents no occasion for the Court to determine whether private persons engaging in the kinds of activities we describe should be granted qualified immunity, these examples support a ruling in favor of respondents on the grounds we propose, leaving open the possibility that private individuals in other circumstances might be entitled to seek the protections of qualified immunity.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

WALTER DELLINGER
Acting Solicitor General
FRANK W. HUNGER
Assistant Attorney General
SETH P. WAXMAN
Deputy Solicitor General
STEPHEN W. PRESTON
Deputy Assistant Attorney General
CORNELIA T.L. PILLARD
Assistant to the Solicitor General
BARBARA L. HERWIG
JOHN F. DALY
Attorneys

FEBRUARY 1997

Supreme Court, U.S.
FILED
JAN 13 1997
CLERK

No. 96-318

IN THE
Supreme Court of the United States
OCTOBER TERM, 1996

DARYLL RICHARDSON and JOHN WALKER,
Petitioners,
v.
RONNIE LEE MCKNIGHT,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

---

BRIEF OF THE INTERNATIONAL CITY/COUNTY MANAGEMENT ASSOCIATION, COUNCIL OF STATE GOVERNMENTS, NATIONAL ASSOCIATION OF COUNTIES, INTERNATIONAL MUNICIPAL LAWYERS ASSOCIATION, U.S. CONFERENCE OF MAYORS, AND NATIONAL LEAGUE OF CITIES AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

RICHARD RUDA *
Chief Counsel
JAMES I. CROWLEY
STATE AND LOCAL LEGAL CENTER
444 North Capitol Street, N.W.
Suite 345
Washington, D.C. 20001
(202) 434-4850
* *Counsel of Record for the* Amici Curiae

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

30 pp

QUESTION PRESENTED

Whether corrections officers who are employed at a prison which is operated by a non-governmental corporation pursuant to a contract with a state or local government are entitled to qualified immunity in a suit under 42 U.S.C. § 1983.

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INTEREST OF THE *AMICI CURIAE*

Amici are organizations whose members include state, county and municipal governments and their officials throughout the United States; *amici* and their members have a compelling interest in legal issues that affect state and local governments. The issue in

this case, whether guards employed at a prison operated by a non-governmental corporation under a contract with a State are entitled to qualified immunity under 42 U.S.C. § 1983, is of core concern to *amici* for several reasons.

In this era of fiscal restraint and government downsizing, state and local governments must continue to provide essential services such as incarcerating dangerous criminals. This is no small task—between 1980 and 1994, the number of inmates in state prisons increased threefold to more than 900,000. *See* U.S. Department of Justice, Bureau of Justice Statistics, *Sourcebook of Criminal Justice Statistics—1995* 548 (1996) (Table 6.11). The population in county and municipal jails has also grown dramatically. *Id.* Many state and local governments have thus turned to the private sector both to operate prisons and to provide ancillary services such as medical care.

The court of appeals' holding that guards employed by contract prison operators are not entitled to qualified immunity—even though public sector guards doing identical work are—poses a substantial threat to the public interest. In the course of their duties, all prison guards encounter a variety of incidents many of which involve threats to the safety of other inmates, prison staff, and the public, and require a prompt and decisive response. The court of appeals' holding, however, subjects guards to damages liability even when the precise contours of constitutional rights have not been clearly established. Such a legal regime will only prompt guards to engage in self-protective behavior by, for example, failing to take decisive action when it is needed. It will also make it more difficult for governments to obtain the assistance of

other professionals such as physicians, whether on a contract or a cooperative basis. *See* discussion *infra* at 17 & n.6.

Because of the importance of these concerns to *amici* and their members, this brief is submitted to assist the Court in its resolution of this case.[1]

STATEMENT

In recent years, state and local governments have been faced with huge increases in inmate populations. Between 1980 and 1994, the population of state prisons increased threefold to more than 900,000; the number of prisoners in local jails increased by 165 percent to more than 480,000. *See* Bureau of Justice Statistics, *Sourcebook of Criminal Justice Statistics —1995* at 548 (Table 6.11). Most state corrections agencies anticipate continued increases in their prison populations in the future. *Id.* at 553 (Table 6.20).

These trends carry a substantial price tag. According to 1994 data, the federal and state governments spend on average $53.24 per inmate per day. *See* Criminal Justice Institute, *The Corrections Yearbook 1995* 51 (1995). Moreover, in fiscal year 1995, state corrections agencies spent nearly $22 billion, or approximately 4.8 percent of state budgets, *see id.* at 48-49; most States projected further increases in spending in fiscal year 1996. *Id.* at 49-50. While many States have responded to the increase in their prison populations by adding capacity either through expansion or construction of new facilities, *see id.* at 38-41, numerous States have looked to alternative

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[1] The parties have consented to the filing of this brief *amicus curiae*. Letters indicating their consent have been filed with the Clerk of the Court.

mechanisms to accommodate this ever growing strain on their budgets.

An increasing number of state and local governments are thus contracting out for the operation of prisons and the provision of prison services such as medical care and substance abuse treatment. Twenty-eight States have enacted legislation authorizing their corrections agencies to contract with private prison operators, *see Do Private Prisons Save Money?*, State Legislatures, Dec. 1996, at 7, and at least nineteen States and numerous local jurisdictions have entered into contracts with private prison operators for the incarceration of prisoners. *See* Charles W. Thomas & Dianne Bolinger, *Private Adult Correctional Facility Census* 2-21 (9th ed. 1996).[2] As of December 31, 1995, there were 104 privatized prisons under contract, with a rated capacity in excess of forty three thousand inmates; contractors anticipated adding more than twenty thousand beds within twelve to eighteen months. *Id.* at 1. Moreover, it was estimated that by year end 1996, the design capacity of prisons under contract would grow to at least 84,500 beds, an additional 33 percent. *Id.* at ix. It is thus clear that privatized prisons are an important alternative for corrections administrators in responding to prison overcrowding.

What is more, contract prison operators have shown that they can provide corrections services of high standard. A recent review by Dr. Charles W. Thomas, Director of the University of Florida's Private Corrections Project, determined that no privately operated jail or prison "is operating under a consent decree or court order as a consequence of suits brought against it by prisoner plaintiffs" for constitutional violations. *Matters Relating To The Federal Bureau Of Prisons: Hearing Before the Subcomm. on Crime of the House Comm. on the Judiciary*, 104th Cong., 1st Sess. 108 (1995). In addition, many privately operated prisons, including the one operated by petitioners' employer, have been accredited by the American Correctional Association and others are in the process of obtaining accreditation. *See id.; see also Private Adult Correctional Facility Census* at 2-21. The willingness of contract prison operators to seek accreditation—a process which involves a lengthy audit of a prison's operations and services by experienced corrections professionals—is a strong indicator that such firms take seriously their obligation to provide high caliber and constitutionally adequate corrections services.

[2] The U.S. Marshals Service, Immigration and Naturalization Service, and Federal Bureau of Prisons have also contracted with private operators for the incarceration of prisoners. *See Private Adult Correctional Facility Census* at 2-11, 14, 16, 18, 21.

SUMMARY OF ARGUMENT

1. The public interest requires that prison guards at contract operated prisons receive the same qualified immunity in Section 1983 suits which the Court has long extended to their counterparts at publicly operated institutions. Guards at contract prisons perform the same functions as those at public prisons; they must maintain order and security in the institution and must respond to a variety of incidents which implicate the safety of other inmates, prison staff, and the public. A proper response to these incidents requires prompt and effective action which frequently must be undertaken with inadequate information. Denying qualified immunity to guards at contractor oper-

ated prisons will only prompt them to engage in self-protective behavior including timid decisionmaking, which could well result in a loss of control of the institution, prisoner escapes, and death or serious bodily injury to other inmates, prison staff and the public at large.

It could also interfere with the State's attainment of its penological goals. As part of their duties, guards are expected to enforce the institution's regulations. Denying guards qualified immunity creates, in effect, a regime of strict liability under which guards will be subject to damages liability for violating constitutional rights even when the law is not clearly established. The fear of personal liability for enforcing prison regulations later held to be unconstitutional could well prompt guards to look the other way rather than enforce them. Not only could this lead to a breach of security or order, it could also interfere with the State's retributive goals as guards ignore rules pertaining to the possession of contraband items or regulating inmate behavior.

2. In denying petitioners qualified immunity, the court of appeals theorized that "private corporations running correctional facilities have a greater incentive to cut costs by infringing upon the constitutional rights of prisoners in order to ensure the profitability of the enterprise," Pet. App. 16a n.4, and that the guards employed by contract prison operators pose an increased threat (over that posed by their public sector counterparts) to inmates' constitutional rights because they "act . . . out of a desire to maintain the profitability of the corporation for whom they labor, thereby ensuring their own job security." *Id.* at 15a. This reasoning, however, rests on highly problematic assumptions about the behavior of both the guards and their employers.

Tellingly, the court of appeals cited no empirical evidence for its assertion that corporations operating prisons are more likely to violate constitutional rights than their public sector counterparts. Moreover, this assertion simply ignores the various political, legal and market based incentives influencing the firms' behavior. It ignores that the State, through both its executive and legislative branches, engages in oversight of the corporation and has the right to cancel the contract at any time upon the giving of adequate notice. *See* Tenn. Code Ann. §§ 41-24-104(a)(1)-(2) & (c)(3); 41-24-109. It ignores the availability of judicial oversight under Section 1983 and that a corporation which cuts constitutional corners risks an adjudication to that effect which might prompt the State to terminate its contract. Finally, it ignores the presence of competition from other firms which have demonstrated their ability to operate prisons in a cost-effective manner without violating constitutional norms.

Considering the nature of the constitutional injuries which guards are most likely to inflict in interacting with prisoners—e.g., violating the Eighth Amendment's prohibition of cruel and unusual punishment by using excessive force—it is improbable that economic considerations are a factor in guards' decisionmaking. Indeed, if the profit motive influences guards' decisionmaking, it would actually induce them to commit fewer constitutional violations. Guards would use less force than that which gives rise to a constitutional violation because the use of force might well inflict a physical injury requiring

medical treatment. The provision of such treatment would raise the corporation's costs and decrease its profitability. Moreover, if guards violate prisoners' constitutional rights, their behavior could result in their employer losing its contract and unemployment for themselves. If guards at contract prisons act "out of a desire to maintain the profitability of the corporation for whom they labor, thereby ensuring their own job security," Pet. App. 15a, they are, contrary to the court of appeals' theory, likely to pose a diminished threat of constitutional injury.

ARGUMENT

PRIVATE INDIVIDUALS PERFORMING GOVERNMENTAL FUNCTIONS AT THE BEHEST OF THE STATE ARE ENTITLED TO QUALIFIED IMMUNITY IN SUITS BROUGHT UNDER SECTION 1983

In *Procunier v. Navarette*, 434 U.S. 555, 561-62 (1978), the Court held that state prison officials serving in both supervisory and subordinate capacities are entitled to qualified immunity in a suit brought under 42 U.S.C. § 1983. The Court's analysis recognized that prison officials, like other executive branch officials, must exercise substantial discretion in the pursuit of their duties. *See id.* Indeed, few other governmental functions can make a greater claim for the need of officials to "'exercise their discretion with[out] undue timidity'" than the administration and operation of corrections facilities. *Id.* at 562 (quoting *Wood v. Strickland*, 420 U.S. 308, 321 (1975)). As the Court has long noted, "[p]rison administrators are responsible for maintaining internal order and discipline, [and] for securing their institutions against unauthorized access or escape." *Procunier v. Martinez*, 416 U.S. 396, 404 (1974).

The Court's observations are no less true when a corrections facility is operated by a private contractor. Such a facility performs the same governmental functions as a state operated penitentiary—it punishes and incapacitates criminal offenders who have been adjudged guilty of a crime. The scenarios which prison officials and corrections officers must respond to—fights, rapes, riots, escape attempts, hostage takings, and violations of prison rules—are unfortunately commonplace in prisons regardless of who operates them.

The court of appeals acknowledged that under this Court's holding in *Procunier v. Navarette*, "*state employed* correctional officers do enjoy the protections of qualified immunity in carrying out their duties." Pet. App. 4a. It also acknowledged that "[t]he public undoubtedly has an interest in maintaining secure and efficient correctional facilities," and that "correctional officers working for a private, for-profit corporation that has contracted with the state are serving a public interest." *Id.* at 15a. It nonetheless theorized that because petitioners are "employees of a private corporation seeking to maximize profits, [they] act, at least in part, out of a desire to maintain the profitability of the corporation for whom they labor, thereby ensuring their own job security." *Id.* Reasoning that the incentive of greater employer profits would prompt "cutting corners on constitutional guarantees," and thus lead to an "increased threat of injury by violation of constitutional guarantees," the court of appeals held that petitioners are not entitled to qualified immunity. *Id.* at 16a.

As explained below, the court of appeals' theory is fatally flawed in several respects. First, it is oblivious to its consequences for the maintenance of security in privately operated prisons as well as the State's

ability to attain its penological goals. It also has adverse consequences for the government's ability to recruit persons to perform governmental duties. Second, it ignores that it is prison guards and not the corporation who have been sued here. Whether it is true as a theoretical matter that a for-profit corporation has an incentive to violate constitutional rights to maximize profits, it is a dubious assertion to suggest that such concerns enter into the decision-making process of guards in their numerous interactions with prisoners, or that private sector guards are subject to different pressures than public sector ones. Moreover, the court of appeals simply ignores the existence of other legal and political mechanisms to ensure that contract prison operators do not violate prisoners' constitutional rights. Denying prison guards qualified immunity does not address this concern. The judgment of the court of appeals should therefore be reversed.

I. THE COURT'S SECTION 1983 JURISPRUDENCE SUPPORTS GRANTING QUALIFIED IMMUNITY TO EMPLOYEES OF CONTRACTORS WHO PERFORM GOVERNMENTAL FUNCTIONS

A. The Public Interest Requires That Corrections Officers At Contract Prisons Be Granted Qualified Immunity

This Court has long recognized that "the public interest requires decisions and actions to enforce laws for the protection of the public." *Scheuer v. Rhodes*, 416 U.S. 232, 241 (1974). As the *Scheuer* Court further observed, "[p]ublic officials, whether governors, mayors or police . . . who fail to make decisions when they are needed or who do not act to implement decisions when they are made do not fully and faithfully perform the duties of their offices." *Id.* at 241-42.

The Court has thus endorsed the doctrine of official immunity, which is rooted in "two mutually dependent rationales." *Id.* at 240. The first is "the injustice, particularly in the absence of bad faith, of subjecting to liability an officer who is required, by the legal obligations of his position, to exercise discretion." *Id.* The second is "the danger that the threat of such liability would deter his willingness to execute his office with the decisiveness and the judgment required by the public good." *Id.*

The Court has also recognized that "[i]n situations of abuse of office, an action for damages may offer the only realistic avenue for vindication of constitutional guarantees." *Harlow v. Fitzgerald*, 457 U.S. 800, 814 (1982) (*citing Butz v. Economou*, 438 U.S. 478, 505-06 (1978)). The doctrine of qualified immunity balances the need to protect citizens against officials' abuse of their offices and the interests which the official immunity doctrine seeks to vindicate. *See Wyatt v. Cole*, 504 U.S. 158, 167-68 (1992); *Butz*, 438 U.S. at 506-07.

In striking this balance, the Court has, however, been mindful of the costs to the public interest imposed by damages suits against public officials. As the Court observed in *Harlow*, such suits impose "a cost not only [on] the defendant officials, but [on] society as a whole." 457 U.S. at 814. And while most of the Court's qualified immunity cases have involved high ranking officials, *see id.*; *Butz*; *Scheuer*, there can be no dispute that suits against lower level officials and employees can impose great costs on society. *See, e.g.*, Peter H. Schuck, *Suing Our Servants: The Court, Congress, and the Liability of Public Officials for Damages*, 1980 S.Ct. Rev. 281, 309-15 (1980). In the case of lower level officials, the per-

ceived risk of personal liability may prompt them to engage in self-protective behavior such as "refrain-[ing] from acting," or "delay[ing] action," which may result in substantial harm to the public interest. *Id.* at 309-10.

In *Navarette*, the Court recognized as much in extending the protection of qualified immunity to corrections officers of publicly operated prisons. *See* 434 U.S. at 562. Indeed, there are two clear and compelling reasons which support qualified immunity for corrections officers: (1) the need to maintain institutional security and order and (2) the need to not unduly interfere with the States' attainment of their penological goals.

As the Court has observed, prisons are "volatile" environments which are involuntarily populated by those

> who have a demonstrated proclivity for antisocial criminal, and often violent, conduct. Inmates have necessarily shown a lapse in ability to control and conform their behavior to the legitimate standards of society by the normal impulses of self-restraint; they have shown an inability to regulate their conduct in a way that reflects either a respect for law or an appreciation of the rights of others.

Hudson v. Palmer, 468 U.S. 517, 526 (1984).

In the course of their duties, corrections officers must respond to a variety of incidents including assaults, rapes, riots, escape attempts, hostage takings, and violations of prison rules.[3] A proper response to

[3] Recent statistics demonstrate the difficulty of maintaining security and order in prisons. In 1994, correctional institutions housing adults reported that 258 inmates escaped from high and medium security facilities; 1619 escaped from low and minimum security facilities. Criminal Justice Institute, *The Corrections Yearbook 1995: Adult Corrections* 23-24 (1995). Inmates, as reported by 44 agencies, committed 13,379 assaults against corrections staff and, as reported by 45 agencies, 24,128 assaults against fellow inmates. *Id.* at 25-26. Of these, more than 2000 assaults on staff resulted in injuries requiring medical attention; over 7400 inmate on inmate assaults required medical attention. *Id.* at 26. Moreover, in 1994 state and federal corrections agencies filed nearly 1.7 million misconduct reports against inmates; nearly six hundred thousand of these reports involved incidents categorized as major misconduct. *Id.* at 28.

In addition, there were 61 inmate on inmate homicides in 1994 and 63 such homicides in 1995. Bureau of Justice Statistics, *Sourcebook of Criminal Justice Statistics—1995* at 603.

such incidents frequently requires prompt and effective action, which must often be undertaken with inadequate information. As the Court has noted, corrections officers must routinely act " 'in haste, under pressure, and frequently without the luxury of a second chance.' " *Hudson v. McMillian*, 503 U.S. 1, 6 (1992) (quoting *Whitley v. Albers*, 475 U.S. 312, 320 (1986)). Timid decisionmaking by corrections officers could well result in a loss of control of the institution, prisoner escapes, and death or serious bodily injury to other inmates, prison staff and the public at large.

The Court's holding in *Navarette* that state employed corrections officers are entitled to qualified immunity thus serves the compelling public interests of preserving institutional security and order. These interests are in no way diminished because the State has contracted with a non-governmental for-profit corporation to operate its prisons. Incidents such as riots, escape attempts, and hostage takings pose the

same substantial threat of loss of life and bodily injury whether they occur in a state operated or a contractor operated prison.

Beyond these ad hoc situations, corrections officers are called upon to enforce the institutions' myriad regulations. Such regulations are generally diverse in their scope, addressing matters which include, *inter alia*, the items which inmates are prohibited from possessing, inmate correspondence, visitation, contact with the news media, telephone calls, use of prison libraries, recreational privileges, and searches. *Cf. generally* 28 C.F.R. pts. 540-553 (Federal Bureau of Prisons Institutional Management regulations). They serve various purposes, including the preservation of institutional security and order and the imposition of punishment.

The fear of personal liability for enforcing regulations later held to be unconstitutional could well prompt corrections officers to look the other way rather than enforce them. In some instances, the failure to enforce a regulation could lead to a breach of security or a loss of order. In others, the failure to enforce regulations could result in an interference with the States' retributive goals as guards ignore the institution's rules pertaining to the possession of contraband items[4] and other aspects of inmate

[4] Within a prison, the definition of contraband is generally much broader than it is in civil society. For example, the Federal Bureau of Prisons defines contraband as "material prohibited by law, or by regulation, or material which can reasonably be expected to cause physical injury or adversely affect the security, safety, or good order of the institution." 28 C.F.R. § 500.1(h). While courts ordinarily defer to prison administrators, a guard's confiscation of some items might well be challenged on various federal constitutional grounds.

behavior. Indeed, it could well lead to a two tier system within the State's penitentiaries: one, comprising prisons run by the State in which the guards still enforce the rules, and a second one, where essential rules are not enforced because the guards do not have qualified immunity.

In either type of prison, it is essential that corrections officers be able to carry out their duties without undue apprehension of personal liability. Subjecting corrections officers at contractor operated prisons to personal liability even when constitutional rights have not been clearly established will only induce these officers to engage in self-protective behavior with substantial harm to the public interest. Private sector prison guards, after all, can no more be expected to predict the future course of federal constitutional law than public sector guards. *See Navarette*, 434 U.S. at 562. It is especially unjust to impose on these "low-level employees," Opp. 4, what is in effect a regime of strict liability. *See Owen v. City of Independence*, 445 U.S. 622, 665 (1980) (Powell, J., dissenting). This is particularly the case given the litigious nature of prisoners, *see* Judicial Conference of the United States, *Long Range Plan For The Federal Courts* 63-64 & n.14 (1995); *The Corrections Yearbook* at 6-7,[5] and the frequent disagreement among the courts over the precise contours of federal constitutional rights.

For example, a guard's seizure of sexually explicit material or revolutionary tracts might well prompt a first amendment claim.

[5] According to the Criminal Justice Institute, in 1994 prisoners filed well in excess of 35,740 lawsuits against state and federal officials. *The Corrections Yearbook* at 6-7.

B. *Wyatt v. Cole* Does Not Support The Denial Of Qualified Immunity To Prison Guards And Other Employees Of Contractors Performing Governmental Functions

Contrary to respondent's contention, *Wyatt v. Cole*, 504 U.S. 158 (1992), does not support the denial of qualified immunity to privately employed prison guards. *See* Opp. 5-7. *Wyatt* should be read—as the Court itself explained—as a narrow decision involving only private parties who act under color of state law in pursuit of private ends. As most courts of appeals have recognized, to hold otherwise would seriously harm the ability of state and local authorities in their performance of governmental functions to obtain the assistance of professionals either through contractual arrangements or their voluntary cooperation.

As the *Wyatt* Court observed, "[t]he precise issue [it decided] is whether qualified immunity, as enunciated in *Harlow*, is available for private defendants faced with § 1983 liability for invoking a state replevin, garnishment, or attachment statute." 504 U.S. at 168-69. The dispute in *Wyatt* arose out of "a soured cattle partnership" between two private parties which prompted one of the parties to obtain a writ of replevin (under a statute subsequently held unconstitutional) to seize property belonging to the other. *Id.* at 159-60. The suit, which challenged the constitutionality of the statute and sought damages, did not involve a private party performing governmental functions and therefore did not implicate any of the traditional concerns which the qualified immunity doctrine protects.

Most courts of appeals thus read *Wyatt* as requiring the denial of qualified immunity to private parties

only when they are pursuing their self-interest. Where, however, a private party is performing a governmental function, whether pursuant to a contract, court order, or request from governmental authorities, the courts of appeals have generally extended the protection of qualified immunity. *See Warner v. Grand County*, 57 F.3d 962, 964-67 (10th Cir. 1995) (extending qualified immunity to private party who performed strip search at request of the police); *Williams v. O'Leary*, 55 F.3d 320, 323-24 (7th Cir. 1995) (extending qualified immunity to physician employed by contractor providing medical services at state prison); *Leeks v. Cunningham*, 997 F.2d 1330, 1333 (11th Cir.) (per curiam) (extending qualified immunity to physician under contract to provide medical services to county jail), *cert. denied*, 114 S.Ct. 609 (1993); *see also Frazier v. Bailey*, 957 F.2d 920, 928-29 (1st Cir. 1992) (extending qualified immunity to employees of private agencies under contract with the State to provide social services).[6]

As these cases recognize, important public interests would be jeopardized by failing to extend qualified immunity to private parties who perform govern-

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[6] *See also Eagon Through Eagon v. City of Elk City*, 72 F.3d 1480, 1489-90 (10th Cir. 1996) (extending qualified immunity to private party designated by city resolution as chairperson of park event); *Sherman v. Four County Counseling Center*, 987 F.2d 397, 402-06 (7th Cir. 1993) (extending qualified immunity to private mental institution which administered anti-psychotic medication under judicial detention order).

Prior to *Wyatt*, the First Circuit had also held that a private physician who conducted a body cavity search upon presentation of a warrant by a police officer is entitled to qualified immunity. *Rodriques v. Furtado*, 950 F.2d 805, 813-16 (1st Cir. 1991).

mental functions. *Cf. Wyatt*, 504 U.S. at 167-68. Governments frequently have to rely on private parties to perform services essential to the effective conduct of their functions. But as the Tenth Circuit observed in *Warner*, if private parties

> are not permitted to raise the shield of qualified immunity, they might reject requests to aid state officials in performing governmental functions. This would clearly constrain state officials' agility in performing such functions, frustrate the government's investigatory power, and thereby limit the state's ability to service the public good.

57 F.3d at 967.[7]

Indeed, in this era in which citizens expect government to do more with less, state and local governments are increasingly contracting out many functions and services. Denying qualified immunity to

[7] In *Sherman* the Seventh Circuit explained:

> If the actions it took pursuant to court order subject it to suit, private hospitals might well refuse to accept involuntary patients. This refusal would increase the load on the strained resources of the state's public hospitals. The *Wyatt* court noted that one purpose of qualified immunity is to avoid discouraging public service. Denying qualified immunity to private hospitals in this situation would do just that. Moreover, in some instances, admission at smaller local private hospitals benefits the involuntary patient by minimizing the disruption of the patient's life. It allows the patient to be evaluated close to home and family. We believe the public interest in maximizing the number of facilities available for the detention and treatment of the mentally ill is best served by not exposing private facilities to liability for discretionary medical judgments made under court order.

987 F.2d at 406 (citing *Wyatt*, 504 U.S. at 167).

government contractors, whether they be physicians, social services workers, or prison guards, will likely decrease the number of service providers and harm the government's ability to serve the public interest.[8] Recognizing that employees of private contractors performing governmental functions are entitled to qualified immunity is thus of the utmost importance to the government's ability "to protect the public at large." *Wyatt*, 504 U.S. at 168.

II. THE COURT OF APPEALS' RATIONALE FOR DENYING QUALIFIED IMMUNITY IS INDEFENSIBLE

While paying lip service to the public's "interest in maintaining secure and efficient correctional facilities," Pet. App. 15a, and acknowledging "that correctional officers working for a private, for-profit corporation that has contracted with the state are serving a public interest by operating Tennessee's prison facilities," *id.*, the court of appeals nonetheless held that petitioners were not entitled to qualified immunity. *Id.* at 16a-17a. It did so on the novel

[8] Respondents asserts that the cases in which the courts of appeals have extended qualified immunity to private persons "involv[ed] high-level professionals who exercised significant discretion—a critical factor under" *Wyatt*, rather than "low-level employees, such as . . . prison guards." Opp. 4. Contrary to respondent's suggestion, prison guards exercise significant discretion in the various duties they perform, such as conducting prisoner searches, responding to disturbances which may require the use of force, and enforcing prison rules. Therefore, prison guards are entitled to qualified immunity. In any event, the Court's decision in *Navarette* disposes of respondent's argument. *See* 434 U.S. at 561-62.

ground that petitioners, as employees of a private, for-profit corporation,

> are not principally motivated by a desire to further the interests of the public at large. Rather, as employees of a private corporation seeking to maximize profits, correctional officers act, at least in part, out of a desire to maintain the profitability of the corporation for whom they labor, thereby ensuring their own job security. While this arguably does not vitiate furtherance of the public interest, it upsets the balance qualified immunity seeks to establish "between compensating those who have been injured by official conduct and protecting the government's ability to perform its traditional functions." The balance struck by qualified immunity, at least implicitly, contemplates a government actor acting for the good of the state, not a private actor acting for the good of the pocketbook.

Pet. App. 15a-16a (quoting *Wyatt*, 504 U.S. at 167). And asserting that "private corporations running correctional facilities have a greater incentive to cut costs by infringing upon the constitutional rights of prisoners in order to ensure the profitability of the enterprise," Pet. App. 16a n.4, the court opined that "this increased threat of injury by violation of constitutional guarantees counsels against granting qualified immunity to correctional officers employed by a private corporation to run a state's prison facilities." *Id.* at 16a.

The court of appeals' reasoning is indefensible. It rests on dubious premises regarding the behavior of the guards and their employer. Quite significantly, the court of appeals does not cite any empirical evidence for its assertions, a telling omission given

the widespread use of contractor operated prisons. *See Private Adult Correctional Facility Census*, at 1.[9] Indeed, the Director of the University of Florida's Private Corrections Project has stated that "I have found no evidence of a private firm having entered into a consent decree or being placed under a court order as a consequence of a finding of unconstitutional jail or prison conditions in a facility for which it was responsible." *Matters Relating To The Federal Bureau Of Prisons: Hearing Before the Subcomm. on Crime of the House Comm. on the Judiciary*, 104th Cong., 1st Sess. 108 (1995) (statement of Prof. Charles Thomas at n.30). As Professor Thomas, who used four different measures to determine whether contract prisons provide "high caliber correctional services," concludes:

> the best available evidence provides no support for the hypothesis that the cost saving strategies of private management firms undermine the caliber of the services provided in the facilities for which they are responsible. To the contrary, it is common for jurisdictions that have contracted for the private management of correctional facilities to report that the overall caliber of the services provided have improved in their scope and quality.

Id. at 110.

Beyond this evidence, the court of appeals' theory that correctional officers of contract prisons pose an increased threat to inmates' constitutional rights because they "act . . . out of a desire to maintain the

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[9] As of December 31, 1995, there were more than 37,000 inmates in the approximately eighty contract prisons then operating. *See Private Adult Correctional Facility Census* at 1.

profitability of the corporation for whom they labor, thereby ensuring their own job security," Pet. App. 15a, rests on highly problematic assumptions about the behavior of both the guards and their employer.

As an initial matter, it seems quite unlikely that cost pressures and job security concerns are more likely to influence the behavior of guards in contractor operated prisons than that of their counterparts in state operated prisons, let alone induce them to violate the inmates' constitutional rights more frequently. Indeed, even if it is true that cost pressures are likely to induce prison guards to cut constitutional corners in private prisons, the court of appeals' decision ignores that in this era in which the citizenry has increased expectations for efficient government, cost pressures also exist in government-owned institutions. The restraints on corrections officers in both types of institutions are thus roughly the same. *Cf.* Pet. App. 20a (Nelson, J., concurring). It is incorrect, then, to assert that prison guards employed by contract prisons pose an "increased threat" of constitutional injuries over the threat posed by guards employed directly by the State.

Indeed, considering the nature of constitutional injuries which prison guards are most likely to inflict in their interactions with prisoners—"using excessive physical force in violation of the Cruel and Unusual Punishments Clause," *see Hudson v. McMillian*, 503 U.S. at 7, or conducting searches in an abusive manner, *see Bell v. Wolfish*, 441 U.S. 520, 560 (1979)—it is improbable that employer profitability is a factor in guards' decisionmaking. But even if the profit motive is a factor in prison guards' decisionmaking, it would—contrary to the court of appeals'

suggestion—actually induce them to commit fewer constitutional violations.

For example, a guard responding to a disturbance would be inclined to use less force than that which gives rise to a constitutional violation because the use of force might well inflict a physical injury which requires medical care. The provision of such care would, of course, increase the corporation's costs and thus decrease profitability; a guard who used excessive force could be disciplined and might well be terminated. Moreover, if the guards violate prisoners' constitutional rights, their behavior could result in their employer losing its contract and unemployment for themselves. The guards' self-interest, then, is in abiding by the Constitution. Contrary to the court of appeals' theory, if guards at contract prisons act "out of a desire to maintain the profitability of the corporation for whom they labor, thereby ensuring their own job security," Pet. App. 15a, they are likely to pose a diminished threat of constitutional injury.

Nor is it self-evident that "private corporations running correctional facilities have a greater incentive to cut costs by infringing upon the constitutional rights of prisoners in order to ensure the profitability of the enterprise." Pet. App. 16a n.4. This reasoning ignores the existence of the various political, legal and market based incentives influencing the corporation's behavior.

First, it ignores that the State, through both its legislative and executive branches, maintains oversight of the corporation and retains the right to cancel the contract at any time upon the giving of adequate notice. *See* Tenn. Code Ann. § 41-24-104(a)(1)-(2) & (c)(3) (Pet. App. 54a); *id.* § 41-24-109 (Pet. App.

59a). Second, it ignores the availability of judicial oversight through suits under § 1983. Indeed, if it were the case that contract prison operators cut constitutional corners, *but see Matters Relating To The Federal Bureau of Prisons* at 108, such conduct would most likely manifest itself in the type of systemic violations which commonly give rise to declaratory and injunctive relief.[10] Granting prison guards qualified immunity in damages actions does not, of course, affect the availability of other relief which is available under Section 1983.[11] Moreover, an adjudication that it has violated prisoners' rights presents the corporation with the additional risk of losing its contract for failing to meet acceptable performance standards. *See, e.g.*, Tenn. Code Ann. § 41-24-105 (Pet. App. 54a-56a).

Third, the court of appeals ignores the presence of competition from other private correctional firms who have demonstrated their ability to operate prisons in a cost-effective manner without infringing constitu-

[10] Whether or not a private, for-profit corporation is suable for damages as a "person" under Section 1983 in the same manner as a municipal corporation *see Monell v. Department of Social Services*, 436 U.S. 658, 690 (1978) (requiring showing of custom or policy to establish municipal liability), declaratory and injunctive relief remain available.

[11] Indeed, if it were the case—contrary to the evidence—that the profit motive creates an incentive for contract prison operators to violate inmates' constitutional rights, it is nonetheless illogical to deny guards qualified immunity. Such pressures would likely manifest themselves in constitutional violations involving prisoners' living conditions. "Low level" guards, however, generally do not make the type of management decisions which are most likely to cause these types of constitutional violations. Denying guards qualified immunity thus does not alleviate this concern.

tional norms. *See Matters Relating To The Federal Bureau of Prisons* at 107-08 (Statement of Charles Thomas). Contract prison operators thus have substantial incentives to comply with the Constitution; guards employed by these firms are no more likely to violate constitutional rights than their public sector counterparts. They should therefore be granted qualified immunity.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

RICHARD RUDA *
Chief Counsel
JAMES I. CROWLEY
STATE AND LOCAL LEGAL CENTER
444 North Capitol Street, N.W.
Suite 345
Washington, D.C. 20001
(202) 434-4850
* *Counsel of Record for the Amici Curiae*

January 13, 1997

No. 96-318

Supreme Court, U.S.
FILED
FEB 12 1997
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

DARYLL RICHARDSON, *et al.*,

Petitioners,

—v.—

RONNIE LEE McKNIGHT,

Respondent.

ON WRIT OF *CERTIORARI*
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

BRIEF *AMICUS CURIAE* OF THE AMERICAN CIVIL LIBERTIES UNION AND THE ACLU OF TENNESSEE IN SUPPORT OF RESPONDENT

Penny M. Venetis
(*Counsel of Record*)
Rutgers School of Law—Newark
Constitutional Litigation Clinic
15 Washington Street
Newark, New Jersey 07102
(201) 648-5687

Steven R. Shapiro
American Civil Liberties Union
Foundation
132 West 43 Street
New York, New York 10036
(212) 944-9800

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INTEREST OF *AMICI* [1]

The American Civil Liberties Union (ACLU) is a nationwide, nonprofit, nonpartisan organization with nearly 300,000 members dedicated to the principles of liberty and equality embodied in the Constitution and our nation's civil rights laws. The ACLU of Tennessee is one of its statewide affiliates. The ACLU and its affiliates serve as counsel in numerous civil rights actions brought pursuant to 42 U.S.C. §1983, and have frequently represented prisoners who allege violations of their constitutional rights. Accordingly, the ACLU is vitally interested in the scope of the immunities available under §1983, and has participated in many cases before this Court addressing that issue.

STATEMENT OF THE CASE

Respondent Ronnie Lee McKnight weighs approximately 300 pounds and is in poor health. He is incarcerated at the South Central Correction Center (SCCC) in Clifton, Tennessee, a correctional facility operated by the Corrections Corporation of America (CCA), a private, for-profit corporation under contract with the State of Tennessee. *See* Private Prison Contracting Act of 1986, T.C.A. §41-24-101, *et seq*. CCA operates several of Tennessee's prisons, including SCCC. CCA is one of the largest and most financially secure prison firms in the industry. Petitioners Daryll Richardson and John Walker work for CCA as prison guards.

Mr. McKnight filed this action against petitioners for compensatory and punitive damages under 42 U.S.C. §1983

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[1] Letters of consent to the filing of this brief have been lodged with the Clerk of the Court pursuant to Rule 37.3.

in the United States District Court for the Middle District of Tennessee. The complaint alleged violations of respondent's Eighth Amendment right to be free from cruel and unusual punishment. Specifically, Mr. McKnight alleged that while petitioners were transporting him from Nashville to the SCCC facility in Clifton, petitioners restrained him with handcuffs and ankle shackles that cut off his circulation. The restraints were extremely painful and caused his limbs to swell. Mr. McKnight further alleged that he pleaded with petitioners to loosen the shackles and handcuffs. Other inmates who were being transported at the same time witnessed Mr. McKnight's pain and swelling and also pleaded with petitioners to loosen the restraints. According to Mr. McKnight, petitioners responded to these pleas with abusive language, and told him to "suffer." When he arrived at SCCC, respondent needed assistance to walk. The injuries caused by the handcuffs and shackles were so severe that Mr. McKnight required hospitalization. He continues to receive medical treatment for his injuries.

Petitioners moved to dismiss the complaint on the ground that they were entitled to qualified immunity notwithstanding their status as nongovernmental employees of a private, for-profit corrections corporation. The district court denied the motion to dismiss, and the Sixth Circuit affirmed.

SUMMARY OF ARGUMENT

This Court should not extend qualified immunity to petitioners because there is neither common law support nor public policy justification for doing so. *See Wyatt v. Cole*, 504 U.S. 158, 161 (1992)(qualified immunity is only available to §1983 public official defendants if a comparable immunity existed at common law when §1983 was enacted, and if public policy justifies the extension); *id.* at 170 (Kennedy, J., concurring)(public policy reasons alone cannot support the judicial recognition of a new §1983 immunity in

the face of legislative silence).

Section 1983 incorporates immunities "firmly rooted in the common law," 504 U.S. at 164. Immunity for profit-making private prisons and their nongovernmental employees is not one of these. When §1983 was enacted in 1871, public prisons leased their inmates to privately run prison work farms in lumber mills, railroads, mines and other industries. All reported cases from this era regarding inmates' rights hold private prisons and their employees liable for abuses inflicted on inmates.

In addition to an absence of common law support, there are no public policy reasons for granting qualified immunity to petitioners. Petitioners would not be immunized under Tennessee law had respondents pleaded a common law tort. The victims of constitutional torts should not be treated less favorably. To the contrary, these victims should be provided with §1983's intended remedial protections. Moreover, there is no reason to suppose that the threat of §1983 liability will chill decisionmaking by nongovernmental prison guards any more than the threat of common law liability.

This Court's qualified immunity cases have recognized that lawsuits against government officials entail "substantial costs" that may interfere, at times, with the public interest in having an efficient and well-functioning government. *Harlow v. Fitzgerald*, 457 U.S. 800, 816 (1982). This Court has also emphasized repeatedly, however, that §1983 exists to "deter state actors from using the badge of their authority to deprive individuals of their federally guaranteed rights and to provide relief to victims if such deterrence fails." *Wyatt*, 504 U.S at 161. These interests must be balanced in determining whether a party is entitled to qualified immunity. *Id.* at 167.

The balance in this case tips in respondent's favor. The public interest in governmental efficiency is not implicated

here where it is private individuals and their corporate employer, not the public, who will absorb the cost of litigation. The common law attempts to match liability for loss with the party who creates the risk. Constitutional law should follow that principle, particularly because of the magnitude of the rights at stake.

Private prisons exist primarily to make a profit, not to serve the public. Accordingly, there is a built-in financial incentive to cut corners, even at the expense of constitutional rights. Cutbacks in personnel and training are a common cost-saving measure. The abuses that have occurred as a result are well-documented in judicial opinions and government reports. *See, e.g., Medina v. O'Neil*, 589 F.Supp. 1265 (S.D.Tex. 1984), *rev'd in part & vacated in part*, 838 F.2d 800 (5th Cir. 1988)(where a prison guard, untrained in the use of firearms, accidentally shot and killed a detainee, and wounded another using a shotgun to force detainees back into their cells); *see, e.g.*, INS, *The Elizabeth, New Jersey Contract Detention Facility Operated by Esmor, Inc.*, Interim Report, July, 20, 1995 (where the continuous abuse of detainees by ill-trained overworked guards culminated in a protest riot). Indeed, the American Bar Association has cautioned against granting qualified immunity to private prisons and their employees because the risk of abuse to inmates is so high. Without the threat of liability, these abuses would often go unchecked; government oversight has frequently proved an inadequate alternative.

This Court has never recognized a §1983 immunity defense unless it has been necessary to further the public interest. Here, the public interest lies in providing maximum protection for constitutional rights rather than maximum profits for private prison corporations.

ARGUMENT

I. THE DOCTRINE OF QUALIFIED IMMUNITY SHOULD NOT APPLY TO NONGOVERNMENTAL PRISON GUARDS EMPLOYED BY FOR-PROFIT CORPORATIONS WHO VIOLATE THE CONSTITUTIONAL RIGHTS OF INMATES COMMITTED TO THEIR CARE BY THE STATE

In 1871, the United States Congress enacted 42 U.S.C. §1983 "to deter state actors from using the badge of their authority to deprive individuals of their federally guaranteed rights and to provide relief to victims if such deterrence fails." *Wyatt v. Cole*, 504 U.S. at 161; *Carey v. Piphus*, 435 U.S. 247, 254-57 (1978). Congress intended §1983 to have an expansive sweep and its breadth to aid in the "preservation of human liberty and human rights." *Owen v. City of Independence*, 445 U.S. 622, 636 (1980)(citing Cong. Globe, 42d Cong., 1st Sess., App. 68 (1871)). *See also Monell v. New York City Dep't of Social Services*, 436 U.S. 658, 683-87 (1978).

The language of 42 U.S.C. §1983 "is absolute and unqualified; no mention is made of any privileges, immunities, or defenses that may be asserted." *Owen*, 445 U.S. at 635; *see also Imbler v. Pachtman*, 424 U.S. 409, 417 (1976)(the plain language of 42 U.S.C. §1983 "admits no immunities"). Nonetheless, this Court has extended "absolute immunity" to certain governmental officials,[2] and "qualified immunity" to

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[2] *See Nixon v. Fitzgerald*, 457 U.S. 731 (1982)(president); *Eastland v. United States Servicemen's Fund*, 421 U.S. 491 (1975)(federal legislators); *Tenney v. Brandhove*, 341 U.S. 367 (1951)(state legislators) *Lake Country Estates, Inc. v. Tahoe Regional Planning Agency*, 440 U.S. 391 (1979)(regional legislators); *Butz v. Economou*, 438 U.S. 478 (1978)(executive officials acting in a judicial capacity); *Stump v. Sparkman*, 435

(continued...)

other governmental officials.[3] The Court justified extension of these immunities on two grounds -- the existence of those immunities in the common law when §1983 was enacted, and the public policy interest in having an effective government that is not consumed with defending against frivolous suits. *See Wyatt*, 504 U.S. at 164; *Imbler*, 424 U.S. at 424-29.

Both rationales are inapplicable here. The extension of qualified immunity to guards in private, for-profit prisons is neither supported by the common law nor by public policy. This Court should therefore hold that petitioners are not entitled to the qualified immunity enjoyed by public officials under §1983. A contrary result would needlessly impair what this Court has defined as the broad and important purposes of §1983: "to provide compensation to the victims of past abuses, [and] to serve as a deterrent against future constitutional deprivations . . . ." *Owen*, 445 U.S. at 651 (1980).

At a time when it has become more and more difficult for plaintiffs to recover for damages under §1983 because of procedural and substantive changes in qualified immunity law,[4] extending §1983 qualified immunity to private prison guards would undermine §1983's remedial goals.[5] The "injustice of [that] result should not be tolerated." 445 U.S. at 651.

This Court's prior decisions recognize as much. When the Court refused to extend qualified immunity to municipal corporations in *Owen*, it specifically rested its holding on the similarity between municipal corporations on the one hand, and private corporations and individuals on the other.

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[2] (...continued)
U.S. 349 (1978)(judges); *Pierson v. Ray*, 386 U.S. 547 (1967)(judges); *Supreme Court of Virginia v. Consumers Union of the United States, Inc.*, 446 U.S. 719 (1980)(judges acting as legislators); *Imbler v. Pachtman*, 424 U.S. 409 (prosecutors); *Briscoe v. LaHue*, 460 U.S. 325 (1983)(witnesses, including police officers acting as witnesses); *but see Malley v. Briggs*, 475 U.S. 335 (1986)(no absolute immunity for police officers acting as complaining witnesses).

[3] *See Scheuer v. Rhodes*, 416 U.S. 232 (1974)(governors); *Wood v. Strickland*, 420 U.S. 308 (1975)(school board officials); *Butz v. Economou*, 438 U.S. 478 (cabinet members), *Harlow v. Fitzgerald*, 457 U.S. 800 (presidential advisors); *Mitchell v. Forsyth*, 472 U.S. 511 (1985) (United States Attorney General). This Court has also extended qualified immunity to defendants who exercise discretion in executing state police powers: *O'Connor v. Donaldson*, 422 U.S. 563 (1975)(mental hospital administrators); *Procunier v. Navarette*, 434 U.S. 555 (1978) (prison officials); *Anderson v. Creighton*, 483 U.S. 635 (1987)(police officers acting in their capacity as law enforcement officials; however qualified immunity does not protect those who are "plainly incompetent" or who "knowingly violate the law"); *Pierson v. Ray*, 386 U.S. 547 (police officers).

[4] *See Harlow v. Fitzgerald*, 457 U.S. 800 (objective test for qualified immunity can be resolved on summary judgment before discovery takes place); *Mitchell v. Forsyth*, 472 U.S. 511 (denial of qualified immunity to a defendant can be reviewed on interlocutory appeal); *Anderson v. Creighton*, 483 U.S. 635 (defendants who do not meet objective test may still receive qualified immunity if they can show they reasonably believed their actions were legal); Laura Oren, "Immunity and Accountability in Civil Rights Litigation: Who Should Pay?", 50 U.Pitt.L.Rev. 935, 995 (1989)(qualified immunity resembles absolute immunity from suit); A. Allise Burris, Note: "Qualified Immunity in §1983 and Bivens Actions," 71 Tex.L.Rev. 123, 160 (1992)(same).

[5] *See, e.g.*, Stephen J. Shapiro, "Public Officials' Qualified Immunity In §1983 Actions Under *Harlow v. Fitzgerald* And Its Progeny: A Critical Analysis," 22 U.Mich.L.Rev. 249, 262-63 (1989)(qualified immunity shields defendants who act maliciously or in bad faith to violate constitutional rights); H. Allen Black, Note: "Balance, Band-Aid, or Tourniquet: The Illusion of Qualified Immunity For Federal Officials," 32 Wm. & Mary L.Rev. 733 (1991)(qualified immunity prevents plaintiffs from even learning whether their constitutional rights were violated and further prevents the development of constitutional law.)

Id. at 640.[6] That comparison would not have made any sense had the Court believed that private corporations and individuals were themselves entitled to qualified immunity.

A. There Is No Historical Support For Petitioners' Claim To Qualified Immunity

This Court has noted that §1983 should be interpreted "in harmony with general principles of tort immunities and defenses rather than in derogation of them." *Malley v. Briggs*, 475 U.S. at 339; *Imbler*, 424 U.S. at 418. In applying that rule of statutory construction, the Court has consistently looked to the common law when §1983 was enacted to determine who is entitled to immunity. The Court has not been mechanical in its reliance on history, however, and has specifically rejected the "assum[ption] that Congress intended to incorporate every common-law immunity into §1983 in unaltered form." *Malley*, 475 U.S. at 340.

Whether Congress intended to incorporate a particular immunity defense into §1983 turns on whether the immunity reflects a tradition "so firmly rooted in the common law and supported by such strong policy reasons that 'Congress

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[6] Writing for the majority in *Owen*, Justice Brennan stated that:

> "There is nothing in the character of a municipal corporation which entitles it to an immunity from liability for such malfeasances as private corporations or individuals would be liable for in a civil action. A municipal corporation is liable to the same extent as an individual for any act done by the express authority of the corporation, or of a branch of its government, empowered to act for it upon the subject to which the particular act relates, and for any act which, after it has been done, has been lawfully ratified by the corporation."

Id. at 640 (quoting T. Shearman & A. Redfield, A TREATISE ON THE LAW OF NEGLIGENCE §120, p.139 (1869)).

would have specifically so provided had it wished to abolish th doctrine.'" *Wyatt*, 504 U.S. at 164 (quoting *Owen*, 445 U.S. at 637, and *Pierson v. Ray*, 386 U.S. at 555).

In this case, there is no historical support for extending qualified immunity to private prisons or their employees, as the lower court properly found. *McKnight v. Rees*, 88 F.3d 417, 420 (6th Cir. 1996)(finding no evidence of immunity for private parties). *See also* 2C Addison, LAW OF TORTS 261 (1881)(at common law, protective clauses did not exempt government contractors and their workers from personal liability for negligent performance of governmental work).

From the eighteenth century through the beginning of the twentieth century, "government appointed jailers ran jails for a profit." David Yarden, "Prisons, Profits, And The Private Sector Solution," Am.J.Crim.L. 325, 326 (Winter 1994). Indeed, prisoners were expected to pay their own way. *Id.* Many prisons leased their inmates to farms, lumber mills, railroads, mines and other industries. *Id.* By 1885, 75 percent of all prisoners were engaged in productive labor, most under private contract agreements. Alexis Durham, III, "Privatization of Punishment: The Nineteenth & Twentieth Century Experience," Criminology, Vol. 27 (1989).

The history of abuse in private prisons is chilling. It is:

> a well-documented tale of inmate abuse and political corruption. In many instances, private contractors worked inmates to death, beat or killed them for minor rule infractions, or failed to provide inmates with the quantity and quality of life's necessities (food, clothing, shelter, etc.) specified in their often meticulously drafted contracts.

Donahue, "Prisons for Profit: Public Justice, Private Interests," Economic Policy Institute (1988), at 19 (citing John J. DiLulio, Jr., *Private Prisons* (May 1987)).

The few reported cases from that era regarding inmates' rights detail the horrendous abuses inflicted on inmates by private contractors and their employees, for which the contractors and their employees were held liable. *See, e.g., Weigel v. Brown*, 194 F. 652 (8th Cir. 1912)(holding a private contractor liable for false imprisonment and unlawful whipping); *In Re Birdsong*, 39 F. 599 (S.D.Ga. 1889)(holding private jailer liable for inflicting cruel and unusual punishment on prisoners); *Hall v. O'Neil Turpentine Co.*, 47 So. 609 (Fla.Sup.Ct. 1908)(holding that an assignment of a convict labor contract was not against public policy when the subcontract held the sublessee liable and responsible for its acts). *Cf. Edwards v. Town of Pocahontas*, 47 F. 268 (W. D.Va. 1891)(holding that a municipal corporation housing prisoners was not entitled to sovereign immunity and was liable for the unsanitary conditions that injured a convict's health).

Because there is no deep-rooted common law tradition to support petitioners' claim for qualified immunity, it should be rejected under this Court's precedents.

B. Extending Qualified Immunity To Petitioners Would Be Contrary to Public Policy

In the absence of a strong common law tradition, at least some members of this Court have taken the position that public policy reasons alone cannot support the judicial recognition of a new §1983 immunity in the face of legislative silence. *See Wyatt*, 504 U.S. at 170 (Kennedy, J., concurring). But even if the Court can appropriately consider public policy concerns when interpreting the scope of

§1983, petitioners' claim for qualified immunity should be rejected in this case.

"Qualified immunity strikes a balance between compensating those who have been injured by official conduct and protecting government's ability to perform . . . ." *Wyatt*, 504 U.S. at 167; *Harlow v. Fitzgerald*, 457 U.S. at 819. Petitioners' principal error is in assuming that only the second half of that equation involves the public interest. This Court has taken a more nuanced approach.

To be sure, the Court's qualified immunity cases have recognized that lawsuits against government officials entail "substantial costs" that may interfere, at times, with the public interest in having an efficient and well-functioning government. *Id.* at 816. As set forth in *Harlow*, these costs include:

> the expenses of litigation, the diversion of official energy from pressing public issues . . . the deterrence of able citizens from acceptance of public office . . . . [and] the danger that fear of being sued will dampen the ardor of all but the most resolute, or the most irresponsible public officials, in the unflinching discharge of their duties.

Id. at 814 (internal quotation omitted).

At the same time, the Court has never lost sight of the fundamental purpose of §1983, which is "to deter state actors from using the badge of their authority to deprive individuals of their federally guaranteed rights and to provide relief to victims if such deterrence fails." *Wyatt*, 504 U.S. at 161. Even when dealing with government officials, therefore, the Court has only recognized a qualified immunity defense "when it was necessary to preserve their ability to serve the public good or to ensure that talented candidates

are not deterred by the threat of damage suits from entering public service." *Id.* at 167.

The Court has emphasized, moreover, that immunities are "not for the protection or benefit of a malicious or corrupt [official], but for the benefit of the public whose interest it is that [officials] should be at liberty to exercise their functions with independence and without fear of consequences." *Pierson*, 386 U.S. at 554 (citations omitted). *See also Wyatt*, 504 U.S. at 167-68. Most significantly, the Court has never recognized a §1983 immunity defense unless it has been necessary to further those goals.

In *Wyatt*, for example, this Court refused to extend qualified immunity to private individuals seeking replevin under a state statute that was ultimately declared unconstitutional. In denying qualified immunity to the private party in *Wyatt*, this Court reiterated the "special policy concerns in suing government officials" articulated in *Harlow*. The Court was unwilling to assume, however, that those same concerns applied to the private defendants in *Wyatt*, even though they were plainly acting under color of state law. 504 U.S. at 167-68.

The Court was careful to note that its holding in *Wyatt* was a limited one. *Id.* at 168-69. Despite that disclaimer, however, the language and logic of *Wyatt* are equally applicable here.

1. The Victims of Constitutional Torts Should Not Be Treated Less Favorably Than the Victims of Common Law Torts

Under Tennessee law, neither petitioners nor their corporate employers could claim the benefit of sovereign immunity if they had been sued for assault and battery. *See* T.C.A. §41-24-107(b). Petitioners offer no explanation, and

none is readily apparent, why the issue of immunity should turn on whether the prisoners in this case pleaded a constitutional tort or a common law tort. Indeed, if anything, our system regards the violation of a constitutional right as more serious and thus more in need of a meaningful remedy. At the very outset, therefore, the argument for qualified immunity in this case rests on a set of inverted values.

It also rests on a misunderstanding of the qualified immunity doctrine and the purposes it is meant to serve. Fairly assessed, the "special policy concerns" that this Court has identified in favor of qualified immunity -- public cost and governmental efficiency -- simply do not apply when the named defendants are private guards employed by a for-profit prison operated under contract to the state. *See Forrester v. White*, 484 U.S. 219, 224 (1988)(courts should "seek to evaluate the effect that exposure to a particular form of liability would have on the appropriate exercise of [the relevant government] functions").

This is not to say that the threat of §1983 litigation may not cause even private prison guards to think twice before acting. That is not always such a bad thing, however. Furthermore, there is no reason to believe that the chilling effect of potential §1983 litigation is any greater than the chilling effect of potential common law tort actions. In both cases, the market can (and will) adjust to the cost of doing business.

While that market adjustment may reduce the profit margin of private prison corporations, this Court has never permitted government, let alone private parties, to trade constitutional rights for economic gain. To the contrary, the Court has recognized that the threat of liability can promote the public interest by helping to deter constitutional violations. *See Wyatt*, 504 U.S. at 161. For precisely that reason, the American Bar Association (ABA) has recommended

that private prison corporations be:

> required to assume all liability arising under the contract and should be prohibited from using immunity defenses, such as sovereign immunity or qualified immunity, to limit such liability . . . The rationale is clear: it creates an economic incentive for the private contractor to provide adequate inmate care and treatment. Permitting a contractor to escape liability would severely undermine the goal of accountability.

ABA, *Guidelines Concerning Privatization of Prison and Jails* (March 29, 1989).

This approach is consistent with prevailing legal norms. Generally speaking, the law attempts to match liability for loss with the party who creates the risk of loss. *See, e.g.*, Herbert Hart & Anthony Honore, CAUSATION IN THE LAW, (2d ed. 1985). It is noteworthy, moreover, that Tennessee has codified that general rule in this particular context by requiring private prison contractors to have adequate insurance plans that specifically cover civil rights claims. T.C.A. §41-24-107(a)(2); *see also* Az.St. §41-1609.01(M)(2)(requiring similar coverage).

As tort law has recognized for centuries, the party best able to prevent the risk is the party who should be allocated that risk. Here, it is reasonable to allot the risk of suit to petitioners and CCA, their corporate employer. CCA benefitted from its contract with Tennessee through substantial earnings. Part of its business planning to yield those profits was an awareness, based on the Tennessee statute denying prison contractors sovereign immunity, T.C.A. §41-24-107(b), that it was liable for common-law torts in state courts. It was also aware, based on Tennessee's statutory insurance requirement, that it could be sued for civil rights

violations.

Those who criticize the decision below do not challenge the value of accountability directly. Nor do they dispute the ability of private prison corporations to calculate the financial risks and opportunities of any venture through standard business planning. They do, however, suggest that the cost of running prisons without qualified immunity may become too expensive for private entrepreneurs. That, of course, is a judgment for the private sector to make. It is not a reason to engraft a new immunity onto §1983 that will further erode the statute's remedial goals.

In addition, the argument is sometimes made that §1983 damages are unnecessary to achieve accountability because government will monitor private prisons and assure their compliance with the Constitution. Even if true, this calculus omits the interest of the prisoner whose constitutional rights are violated despite monitoring. In fact, there are good reasons to doubt that public monitoring can or will ever be an adequate safeguard.

Many states already have statutes in place that require public officials to monitor the performance of private prisons. Yet, notwithstanding these statutory requirements, the monitoring record is at best spotty. The explanation for this failure to oversee, once again, is largely economic. More often than not, government officials are sold on the idea of privatization because they believe it will reduce costs. And, because of their desire to reduce costs as much as possible in the current political climate, they do not always budget for the cost of monitoring the private prison in calculating the contract price. *See* James Gentry, "The Panopticon Revisited: The Problem Of Monitoring Private Prisons," 96 Yale L.J. 353, 359 (Dec. 1986). When they do, they often discover that the combined costs of the contract and monitoring exceed the costs to the government in running the prison system itself. *Id.* "Monitoring expenditures are thus

capped by a criterion wholly unrelated to prison quality." *Id.*[7]

Recognizing a new qualified immunity under these circumstances would not promote the public interest. To the contrary, it would subordinate the public interest to the private interest of for-profit prison corporations.

2. Private Prisons Primarily Exist To Make A Profit And Not To Serve The Public

In the United States, there are 21 companies, earning more than $250 million dollars in annual revenues, managing 88 prisons that house 50,000 inmates. Steven Donziger, *The Prison-Industrial Complex; What's Really Driving The Rush To Lock 'Em Up*, Washington Post, Mar. 17, 1996, at C3. This amounts to a twenty-fold private prison population increase since 1984. *Id.*

The impact of this rapid private prison industry growth is reflected on the stock exchange. Shares of the third largest private prison corporation, Wackenhut Corrections, soared 203 percent in 1996. Sandra Block, *Everybody's Doin' The Jailhouse Stock*, USA Today, June 5, 1996, at B3. The stock traded at 100 times Wackenhut's 1996 estimated earnings, significantly higher than the average 17 times estimated earnings for the Standard & Poor's 500. *Id.* Shares of CCA, petitioners' employer and one of the largest and best capitalized of the private prison firms, traded at

[7] *See also* Ward McAfee & David Shichor, A HISTORICAL-SOCIOLOGICAL ANALYSIS OF CALIFORNIA'S PRIVATE PRISON EXPERIENCE IN THE 1850S: SOME MODERN IMPLICATIONS, Crim. Just. Hist., Vol. 11 (1990)("Given that the primary motive for resorting to privatization is to cut costs, maintenance of a thorough (and costly) oversight role would inevitably come into criticism. In the California situation, oversight was discontinued as an unnecessary expense").

111 times their 1996 estimated earnings. *Id.* In 1995 alone, CCA's revenue grew 36% to more than $207 million. *See* CCA, 1996 ANNUAL REPORT TO SHAREHOLDERS 2, 6. As of June 30, 1996, CCA was the "number one stock performer of all the companies listed on the New York Stock Exchange," according to CCA's Chairman and Chief Executive Officer. Shannon Turner, *Interview*, Dow Jones Investor Network, Sept. 12, 1996, available in WESTLAW, Newspapers, Magazines, and News Service Database, All News File.[8] Some private prison companies openly admit to operating prisons "mainly to make a buck." Douglas Dunham, "Inmate Rights and the Privatization of Prisons," Col.L.Rev. 1475, 1484 (Nov. 1986)(citing Desert News, June 20-21, 1985, at B7).

3. Private Prisons Have Financial Incentives To Cut Corners At The Expense Of Inmates' Constitutional Rights

Despite their profitability, recent studies show that private prisons may not be the "magical solution" to cure governments' fiscal woes that they were touted to be. There has been little or no demonstrable cost difference between private and public prison maintenance.

In 1996, the United States General Accounting Office (GAO) reviewed five studies completed since 1991 which compared the operational costs and/or the quality of service of private and public correctional facilities. In its REPORT TO THE SUBCOMMITTEE ON CRIME, COMMITTEE OF THE JUDICIARY, HOUSE OF REPRESENTATIVES, GAO "could not

[8] CCA's Chairman also indicated during the same interview that CCA's credit line grew from $20 million to $170 million in 1996 and that, as of end of the second quarter, CCA also had $120 million dollars in cash. *Id.*

conclude whether privatization saves money." GAO, REPORT, Aug. 16, 1996. The studies GAO analyzed reported little difference, or such mixed results that they were inconclusive. *Id.*

The soundest study was from the state of Tennessee. *Id.* On February 1, 1995, Tennessee issued the results of a two-year evaluation of three nearly identical prisons within its borders -- one private, which is owned by CCA, and two public.[9] In contrast to petitioners' assertions, (Pet.Br. at 44-45), Tennessee found very little difference in average inmate costs per day among the three facilities -- $35.39 for the private facility, and $34.90 and $35.45, respectively for the two public facilities. *Id.* A New Mexico study reviewed by GAO showed CCA's average inmate costs per day for its private women's prison were 50 percent *more* than the average estimate for male inmates in the state-run prisons. Mark Oswald, *Cost Savings Of Private Prisons Inconclusive*, The Santa Fe New Mexican, Aug. 26, 1996, at A1.

To remain competitive, private prison corporations must devise ways to trim costs or to sell their services regardless of the *de minimis* savings they afford. The first choice (not spending money) creates the direct benefit of additional profits. The second choice (lobbying to secure anticipated profits) requires added expenses. Thus, from a profit-making perspective, there is a greater incentive for private prisons to cut corners. *See* Gentry, *supra,* at 357.

Cutting labor costs is the most obvious source of higher

[9] Tennessee Select Oversight Committee on Corrections, *Comparative Evaluation of Privately Managed Corrections Corporation of America Prison (South Central Correctional Center) and State Managed Prototypical Prisons (Northeast Correctional Center, Northwest Correctional Center)*(February 1, 1995).

profits.. Labor accounts for roughly 60 percent of the overall costs of corrections. Donahue, *supra*, at 14. Thus, a reduction in the hiring and training of line personnel would have the biggest impact on private prison costs and short-term profitability. The obvious implication of these lower labor costs is a lower quality workforce. *Id.* at 15. The ABA Guidelines, *supra*, provide: "a prison or jail cannot be operated safely and in accordance with constitutional, statutory and contractual standards without an adequately trained staff."

Constitutional violations have resulted when private prisons kept their operating costs low by cutting back on their security personnel, *see, e.g., Ruiz v. Estelle*, 503 F. Supp. 1265 (S.D.Tex. 1980), *aff'd in relevant part*, 679 F.2d 1115 (5th Cir. 1982), *cert. denied*, 460 U.S. 1042 (1983), and by cutting back on guard training. *See, e.g., Medina v. O'Neil*, 589 F.Supp. 1028. In *Medina*, a private guard, untrained in the use of firearms, accidentally shot and killed a detainee and seriously wounded another when he attempted to use his shotgun as a cattle prod to force sixteen detainees into their tiny cell.

On June 18, 1995, noncriminal immigrants who were being detained by the United States Immigration and Naturalization Service (INS) at a private detention center run by Esmor, Inc. (Esmor) in Elizabeth, New Jersey, rioted to protest repeated incidents of abuse and inhumane conditions of confinement. Before local officials closed the center, INS performed a program review and investigation of the center's operation. In an interim report issued July 20, 1995, INS found Esmor to be in severe violation of its contract.[10]

[10] Despite these violations and Esmor's substantial loss when the Elizabeth facility was closed, the company's growth was not deterred. After changing its name to Correctional Services Corporation (CSC), the com-

(continued...)

INS, *The Elizabeth, New Jersey Contract Detention Facility Operated By Esmor, Inc.*, Interim Report, July 20, 1995.

The *Interim Report* noted that "many of the guards hired by [the company] did not meet the requirements of the contract or were only marginally qualified." *Id.* Some guards were employed before receiving a mandatory 40-hour training course, and the contractual requirement of 120 additional hours of training was not met in many instances. *Id.* Because of low level of salaries, the employee turnover rate was a high 60 percent. *Id.* Esmor guards who did remain had to compensate for the shortness of staff by performing large quantities of overtime work. *Id.* The guards, therefore, were not only ill-trained but overworked.

Esmor guards mistreated and harassed detainees. *Id.* The identified abuses included: physical beatings, issuance to female detainees of oversized male underwear with question marks written in the crotches, awakening detainees with frequent and unnecessary security checks, refusal to issue sanitary napkins to female detainees who were menstruating, and theft of detainee property.[11] As stated by one commentator: "If the central goal of privatization is saving

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[10] (...continued)
pany again earned record revenues in less than a year. *Correctional Services Corporation Reports Second Quarter Operating Results*, Business Wire, Aug. 13, 1996. From 1992 to 1996, CSC's revenues have nearly tripled. *Id.*

[11] For dramatic accounts of individual cases at Esmor, *see Prepared Testimony by Mary Diaz, Director Women's Commission For Refugee Women and Children*, Federal News Service, May 8, 1996, regarding the story of Hawi Abda Jama, who received political asylum after two years of confinement and abuse, and Celia W. Dugger, *Woman's Plea For Asylum Puts Tribal Ritual On Trial*, New York Times, Apr. 15, 1996, at A2, recounting the story of Fauziya Kasinga, who received political asylum to escape female genital mutualization in Togo.

money, if incarceration contracts are awarded on the basis of costs, and if it is technically possible to cut costs by lowering standards, then quality control becomes an urgent issue." Donahue, *supra*, at 20.

Reducing labor costs are not the only means by which private prison corporations can reduce expenses. There may be financial incentives in disciplining prisoners, as well. These incentives are in direct conflict with inmates' constitutional rights. In an ABA study of private corrections, Professor Ira B. Robbins expressed concern that private prison firms would have an "institutional bias toward disciplining prisoners." Robbins, "The Legal Dimensions Of Private Incarceration," 38 Am.U.L.Rev. 531, 574 (Spring 1989). For example, a decision to deny privileges or services would reduce operating costs and promote administrative convenience. *Id.* Another example, ultimately causing revenue gains, involves the decision to revoke a prisoner's good-time credits. *Id.*

"Good-time" is awarded for exemplary behavior in prison. It is deducted from the length of sentences and taken into account in making parole decisions. Dunham, *supra*. Infractions of prison rules are often punished by the forfeiture of good-time credits. *Id.* Denial of these sentence credits increases a private prison's profit quotient by lengthening a prisoner's incarceration period. While this particular issue is not directly implicated in this case because a Tennessee statute places good-time determinations in the hands of the state, T.C.A §41-24-112, Professor Robbins' concerns are not improbable. Other states, such as New Mexico, delegate good-time determination to private prisons. Oswald, *supra*. It is noteworthy that, in 1994, women inmates in CCA's facility in New Mexico were found to have lost more good-time than male inmates in state-run prisons. *Id.*

II. ANY GOOD FAITH AFFIRMATIVE DEFENSE WHICH MAY BE AVAILABLE TO PRIVATE FOR-PROFIT DEFENDANTS IN LIMITED CIRCUMSTANCES AS PROTECTION AGAINST FRIVOLOUS SUITS BROUGHT UNDER 42 U.S.C. §1983 IS NOT APPLICABLE HERE

In *Wyatt*, this Court held that, even though a private for-profit party invoking an unconstitutional state replevin statute to seize property was not entitled to qualified immunity, it *might* be able to assert a "good faith affirmative defense." 504 U.S at 169. The Court did not resolve that issue, however, because it was not "fairly before" the Court. *Id.* Here too, the issue of a good faith defense is "not fairly before the Court" and should not be reached. Brief for Appellant at i, *Richardson v. McKnight*, 88 F.3d 417 (6th Cir. 1996)(No. 96-318). *Amici* nevertheless offer these brief observations.

Because the issue was not raised in *Wyatt*, this Court did not define the parameters of the good faith affirmative defense. *See* 504 U.S. at 169. Its discussion of the defense, however, as well as the reasoning of the concurring opinion, indicate that, if the good faith defense exists for private defendants, it would be available only in very limited circumstances that are readily distinguishable from the present case. *See id.* (limiting the probable availability of the good faith defense to the use of unconstitutional garnishment, prejudgment attachment, and replevin statutes).

Lower courts interpreting *Wyatt* have extended the good faith affirmative defense only to private parties who acted pursuant to a state law or ordinance that was later declared unconstitutional. *See Duncan v. Peck*, 844 F.2d 1261 (6th Cir. 1988)(allowing a private party to a contract to raise a good faith affirmative defense to their participation in an unconstitutional deprivation of property); *Wyatt v. Cole*, 994 F.2d 1113 (5th Cir. 1993)(allowing private rancher to raise a good faith defense to his role in an unconstitutional deprivation of property); *Britt v. Whitehall Income Fund '86*, 891 F.Supp. 1578 (M.D.Ga. 1993)(allowing warehouse partnership to raise a good faith defense against their contribution to an unconstitutional arrest); *Jordan v. Fox, Rothschild, O'Brien & Frankel*, 20 F.3d 1250 (3d Cir. 1994)(allowing lessors to raise a good faith defense to their participation in an unconstitutional deprivation of property); *Nemo v. City of Portland*, 910 F.Supp. 491 (D.Or. 1995)(allowing city park corporation employee to raise a good faith defense for inhibiting the free exercise of speech and assembly); *Vector Research v. Howard & Howard Attorneys*, 76 F.3d 692 (6th Cir. 1996)(allowing manufacturer and its attorneys raise a good faith defense for their participation in an unconstitutional search and seizure).[12]

The defendants in these post-*Wyatt* cases were entitled to assert a good faith affirmative defense because they believed that the laws upon which they relied when they violated plaintiffs' rights were valid. Absent a facially valid statute -- and none exists in this case -- there is much less reason to depart from the general principle that §1983 "should be read against the background of tort liability that

[12] In spite of this general agreement, the lower courts are split on the precise substantive definition of the good faith affirmative defense. Some courts regard the good faith inquiry as *strictly* subjective. *See Jordan*, 20 F.3d at 1276 (the defense depends on the "subjective state of mind"); *Nemo*, 910 F.Supp. at 498-99 (focusing on a "subjective belief of good faith"). Other courts include an objective component in determinations of good faith. *See Wyatt* 994 F.2d at 1118 (addressing the objective question of whether defendant *should* have known his conduct was unconstitutional); *Britt*, 891 F.Supp. at 1583-84 (focusing on an objective determination of whether reliance on the constitutionality of a statute was reasonable).

makes a man responsible for the consequences of his actions." *Pierson*, 386 U.S. 556 (quoting *Monroe v. Pape*, 365 U.S. 167, 187 (1961)).

When the challenged behavior in a §1983 lawsuit takes place pursuant to a legislative enactment, it may well be reasonable to assign primary responsibility for the constitutional violation to the state rather than the private individuals who relied on the state's erroneous constitutional judgment. A very different situation exists, however, when there is no underlying statute, and thus no claim that the state has directed, authorized, or ratified the defendants' unconstitutional acts. In the latter case, there is no obvious reason why the private defendant in a §1983 suit should be treated differently than any other tortfeasor, who could not avoid liability in a nonconstitutional context by asserting a good faith defense.

As Justice Kennedy remarked in *Wyatt*, "there is support in the common law for the proposition that a private individual's reliance on a statute, prior to a judicial determination of unconstitutionality, is considered reasonable as a matter of law." 504 U.S. at 174 (concurring). In this case, petitioners do not even claim to have relied upon a statute, ordinance or any other positive law in their interactions with respondent. Under these circumstances, even a limited good faith defense should not apply.

CONCLUSION

For the reasons stated above, the judgment below should be affirmed.

Respectfully submitted,

Penny M. Venetis
(*Counsel of Record*)
Rutgers School of Law -- Newark
Constitutional Litigation Clinic
15 Washington Street
Newark, New Jersey 07102
(201) 648-5687

Steven R. Shapiro
American Civil Liberties Union
Foundation
132 West 43 Street
New York, New York 10036
(212) 944-9800

Dated: February 11, 1997

No. 96-318

Supreme Court, U.S.
FILED
FEB 12 1997
CLERK

IN THE
Supreme Court of the United States
OCTOBER TERM, 1996

DARYLL RICHARDSON and JOHN WALKER,
Petitioners,

v.

RONNIE LEE MCKNIGHT,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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BRIEF OF *AMICUS CURIAE* AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, AFL-CIO, IN SUPPORT OF RESPONDENT

MARK D. ROTH
ANNE M. WAGNER *
AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, AFL-CIO
80 F Street, N.W.
Washington, D.C. 20001
(202) 639-6425
Counsel for *Amicus Curiae*

* Counsel of Record

February 12, 1997

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

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QUESTION PRESENTED

Are employees of a private, for-profit corrections corporation which performs some of the duties traditionally carried out by a state department of corrections entitled to assert qualified immunity in an action for damages under 42 U.S.C. § 1983?

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BRIEF OF *AMICUS CURIAE* AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, AFL-CIO, IN SUPPORT OF RESPONDENT

INTEREST OF THE *AMICUS CURIAE*

The American Federation of Government Employees, AFL-CIO, ("AFGE") submits this amicus brief in support of respondent McKnight, who filed suit against petitioners under 42 U.S.C. § 1983 alleging that they had violated his Eighth Amendment rights. Specifically, AFGE joins respondent in arguing that qualified immunity from a § 1983 action is not available to employees of a private, for-profit corporation, which has contracted with the state of Tennessee to manage correctional facilities.[1]

---

[1] Counsel for respondent, Ronnie Lee McKnight, and for petitioners, Daryll Richardson and John Walker, have consented in writing to the filing of this brief.

AFGE represents some 700,000 federal and District of Columbia government workers, including federal prison guards. Congress recently authorized the privatization of one federal corrections facility, on an experimental basis, and has considered a more widespread use of private contractors to maintain federal penal institutions. The Union has strenuously opposed efforts to contract these, and other, core functions of the government.

Federal officers and employees can be held liable for money damages for unconstitutional conduct committed during the course of their employment. *See Bivens v. Six Unknown Federal Narcotics Agents*, 403 U.S. 388 (1971). Although this case arose under 42 U.S.C. § 1983, the Court has traditionally not distinguished between suits alleging constitutional violations under § 1983 and those brought directly under the Constitution when resolving claims of official immunity. *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982) ("it would be 'untenable to draw a distinction for purposes of immunity law between suits brought against state officials under § 1983 and suits brought directly under the Constitution against federal officials.' "). Therefore, a ruling in this case will undoubtedly affect federal employees, and AFGE bargaining unit members, who are competing with contractors to retain in-house, the performance of federal functions.

STATEMENT

Amicus adopts respondent Ronnie Lee McKnight's Statement of the Case.

SUMMARY OF ARGUMENT

Petitioners' demand for official immunity from suit for acts committed while carrying out their duties as privately employed prison guards must be rejected as lacking either an antecedent in common law or a justification based upon public policy.

Federal and state governments are under increasing political and economic pressure to contract out their functions, even those, such as guarding prison inmates, which are arguably core or inherently governmental. Proponents of privatization, most notably those hoping to be awarded such contracts, often disparage the public sector as inefficient and hampered by process. Although the cost-effectiveness of "contracting out" is dubious, in our view, its advocates routinely commend the private sector precisely for being unencumbered by perceived constraints on governmental conduct.

Public officials and employees are obliged to carry out their mission within the parameters of constitutional, statutory, regulatory, and political imperatives which have the public interest as their sole object, and which are designed to maximize public accountability. Conversely, the primary, and legitimate, purpose of private enterprise is to generate a profit for its investors. While the government may "contract out" a function, the contractor's performance is fundamentally controlled by its business purpose, which may, or may not, conform with the public interest, and which may, or may not, withstand the exacting standards applied to government conduct.

Service to, and accountability for, the common good is the bedrock of public employment, from hiring to retirement, from the highest office to the lowest position. These fundamental precepts clearly distinguish it from private enterprise in a way that warrants application of immunity in one setting, but not the other. The divergent purposes of the public and private sectors weigh heavily against granting these private employees an immunity, heretofore reserved for government officials, from suits alleging constitutional violations. The balance is tipped even further by the fact that a damages action under § 1983 may be the most effective means of ensuring that contractors remain accountable for their actions with regard to constitutional rights. This is especially true here, where the plaintiff is an inmate in a correctional facility already removed from public view and access.

Furthermore, as government contracts out more and more functions, the contractors' potential liability for constitutional violations may become the only realistic deterrent to unlawful conduct. Therefore, amicus AFGE respectfully asks that the Court affirm the lower court's decision holding that petitioners are not entitled to qualified immunity for unconstitutional acts committed in the course of their employment.

ARGUMENT

I. THERE IS NO COMMON LAW SUPPORT, OR PUBLIC POLICY RATIONALE, FOR EXPANDING THE DOCTRINE OF OFFICIAL IMMUNITY TO PRIVATELY EMPLOYED PRISON GUARDS.

This Court has consistently ruled that government officials possess some form of immunity from suits for damages caused by their official acts. *Harlow v. Fitzgerald, supra*, 457 U.S. at 807. Certain government officials, such as the President, legislators, judges, and prosecutors, generally enjoy absolute immunity from such actions. *Id.*; *Forrester v. White*, 484 U.S. 219, 224-226 (1988). For other governmental officers, however, qualified immunity is the norm. *Harlow, supra,* 457 U.S. at 807. As such, it shields "government officials performing discretionary functions . . . from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow, supra,* 457 U.S. at 818.

In the instant case, Mr. McKnight alleged that petitioners, in their capacity as privately-employed prison guards, violated his Eighth Amendment rights. He brought this action under the Civil Rights Act of 1871, 42 U.S.C. § 1983, which provides, in pertinent part, that a cause of action will lie against "every person who, under color of any statute . . . of any State . . . subject, or causes to be subject, any citizen . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution and

laws. . . ." 42 U.S.C. § 1983. The provision is designed "to deter state actors from using the badge of their authority to deprive individuals of their federally guaranteed rights and to provide relief to victims if such deterrence fails." *Wyatt v. Cole,* 504 U.S. 158, 161 (1992).

Section 1983 "creates a species of tort liability that on its face admits of no immunities." *Imbler v. Pachtman,* 424 U.S. 409, 417 (1976). The Court has not, however, construed 42 U.S.C. § 1983 as signifying congressional revocation of the doctrine of immunity for government officials. *See Pierson v. Ray,* 386 U.S. 547, 554-555 (1967). Rather, that doctrine was deemed to be so deeply ingrained in the common law at the time of § 1983's enactment, and grounded in such strong policy concerns, that " 'Congress would have specifically so provided had it wished to abolish [it].' " *Owen v. City of Independence,* 445 U.S. 622, 637 (1980) *quoting Pierson v. Ray, supra,* 386 U.S. at 555. The Court has nevertheless been sensitive to the fact that by incorporating immunity defenses into § 1983 jurisprudence, it is "devising limitations to a remedial statute, enacted by Congress, which 'on its face does not provide for *any* immunities.' " *Wyatt v. Cole, supra,* 504 U.S. at 171 (Kennedy, J., concurring) *quoting Malley v. Briggs,* 475 U.S. 335, 342 (1986). Thus, at various times, it has warned against expanding the scope of the immunity based upon "free-wheeling" notions of policy or efficiency. *See e.g., Wyatt, supra,* 504 U.S. at 170-172.

The special policy concerns which do justify qualified immunity to government officials include the need to "preserve their ability to serve the public good or to ensure that talented candidates were not deterred by the threat of damages suits from entering public service." *Wyatt v. Cole, supra,* 504 U.S. at 167. The essential purpose of qualified immunity is, therefore, "to safeguard government, and thereby to protect the public at large, not to benefit its agents." *Id.* at 167-168.

As respondent ably argues, the common law provides no basis for petitioners' contention that private parties are entitled to qualified immunity.[2] Similarly, this case implicates none of the policy concerns which, in the context of governmental actors, justify depriving injured parties of a cause of action for constitutional violations. Most damaging to petitioners' claim in this latter regard is the Court's unambiguous declaration in *Wyatt* that "rationales mandating qualified immunity for public officials are not applicable to private parties." *Wyatt v. Cole, supra,* 504 U.S. at 167.

In *Wyatt,* a private creditor, who was sued under § 1983 after attaching the debtor's property under the state replevin statutes, asserted a qualified immunity defense, which had been successfully raised by the sheriff and deputies involved in the seizure, on the grounds that he relied on a state law which he had no reason to believe was invalid. The Court rejected this contention, however, stating that while fairness might suggest that he be entitled to the same protection as that given to the sheriff and deputies, as a private individual, his interests were "not sufficiently similar to the traditional purposes of qualified immunity to justify such an expansion." In particular,

> . . . unlike public officials, private parties hold no office requiring them to exercise discretion; nor are they principally concerned with enhancing the public good . . . [nor would immunity] bear[] on whether public officials are able to act forecfully and decisively in their jobs or on whether qualified applicants enter public service . . . unlike with government officials performing discretionary functions, the public interest will not be unduly impaired if private individuals are required to proceed to trial.

[2] Amicus hereby incorporates respondent's arguments, and adds the following comments primarily to illuminate the concrete differences between public service and private enterprise which are relevant to the immunity question at issue here.

Wyatt v. Cole, supra, 504 U.S. at 168. Thus, the Court concluded that the "nexus between private parties and the historic purposes of qualified immunity is simply too attenuated to justify such an extension of our doctrine of immunity." *Id.*

While the holding of *Wyatt* may be narrow, the Court's opinion certainly speaks to the broader issue of whether the scope of immunity can be enlarged to protect private parties from damages actions. In particular, it explains why the policies justifying qualified immunity for public officials simply do not apply to private parties. These policies are equally applicable here. That petitioners are employed by a corporation which has contracted with the government does not distinguish this case from *Wyatt,* or warrant the drastic departure from settled principles of immunity law which they seek.

As a threshold matter, it is axiomatic that persons do not acquire public office by virtue of a contractual relationship with the government to perform services. *See Metcalf & Eddy v. Mitchell,* 269 U.S. 514, 520 (1925) (contracts for services as consulting engineers, though entered into by authority of law, did not create an office or endow plaintiffs with status as officers or employees so as to be exempt from taxation.) In the federal government, for example, an officer is statutorily required to be appointed in the civil service by either the President, United States court, agency head or Secretary of a military department, to engage in the performance of a federal function under authority of law or Executive act, subject to the supervision of one of the aforementioned authorities while in the performance of that duty. 5 U.S.C. § 2104.[3]

[3] For purposes of the Civil Service Reform Act codified throughout title 5 of the United States Code, an "employee" is defined as any officer or individual, appointed in the civil service by the President, Member of Congress or the Congress, member of a uniformed service, another employee, head of a government con-

Despite their efforts to cloak themselves in the mantle of public office (pet. br. 33-46), petitioners do not possess the most basic prerequisites of that designation. Public policy "demands that an officeholder discharge his duties with undivided loyalty." 63 Am. Jr. 2d *Public Officers and Employees* § 319. He or she must have an undivided duty to the public whom they serve, and must act in the best public interest. *Id.* Specifically, a public office is "created for the purpose of effecting the end for which government has been instituted, which is the common good, and not for the profit, honor, or private interest of any one person, family, or class of persons." *Id.* at § 2.

These are not empty platitudes trotted out to bolster our contention that public service is different from private enterprise in a way that is relevant to the disposition of this case. On the contrary, these statements reflect principles which actually infuse government service from hiring to retirement, and apply whether one occupies the office of President or the position of clerk-typist in an obscure government agency.

For example, Congress has enacted a myriad of laws governing federal employees which are designed, or have been invoked, to protect the integrity of the federal government. Specifically, federal officials are prohibited from hiring or promoting relatives, or granting "any preference or advantage not authorized by law, rule or regulation to any employee or applicant." *See* 5 U.S.C. § 2302(b)(6) and (7); 5 U.S.C. § 3110. They are criminally liable for willful and corrupting interference with the hiring process. 18 U.S.C. § 1917. In addition, employees who falsify an employment application are subject to criminal sanctions, *see* 18 U.S.C. § 1001, in addition to being fired. *See Kissner v. OPM*, 792 F.2d 133 (Fed. Cir. 1986).

Applicants are, by law, subject to rigorous suitability examinations to ascertain their "fitness . . . as to age,

trolled corporation, or adjutant general who is engaged in the performance of a federal function under authority of law or an Executive act under the supervision of one of the foregoing authorities. 5 U.S.C. § 2104.

health, character, knowledge, and ability." 5 U.S.C. § 3301 *et seq.* *See also* 5 C.F.R. § 731. They may be further required to submit to security clearance investigations in the case of sensitive positions. 5 U.S.C. § 7531 *et seq.*

A federal employee's tenure in office is similarly circumscribed by proscriptions against conduct which conflicts, or even appears to conflict, with the government's interest. Government-wide regulations promulgated by the Office of Government Ethics ("OGE") state that "public service is a public trust" endowing each employee[4] with a "responsibility to the United States Government and its citizens to place loyalty to the constitution, laws and ethical principles above private gain." 5 C.F.R. § 2635.101(a). An entire chapter of Title V of the United States Code is dedicated to prescribing specific merit system principles and prohibited personnel practices that insulate government employment from the pressures, weaknesses, and temptations of the private sector and insure the undivided loyalty of federal civil servants.

The requirement of undivided loyalty pervades the federal conflict-of-interest laws, including prohibitions against bribes and graft, violations of which could subject employees to criminal and civil liability. *See* 18 U.S.C. §§ 201-209. Employees are further subject not only to the OGE's government-wide regulations noted above, but also, to each agency's standards of conduct.[5]

[4] The definition of employee for purposes of these regulations includes nonmilitary officers. *See* 5 C.F.R. § 2635.102.

[5] Standards of conduct governing employees of the U.S. Department of Justice, of which the Bureau of Prisons is a component, are published at 28 C.F.R. § 45.735 *et seq.* They provide, in part, that "[i]n all their activities, both personal and official, [employees] should be mindful of the high standard of behavior expected of them." 28 C.F.R. § 45.735-2. Another section identifies no less than sixteen *statutory* prohibitions on their conduct, including, *inter alia*, disclosure of confidential information (18 U.S.C. § 1905). 28 C.F.R. § 45.735-21.

In addition, employees may not advocate the overthrow of, or partictipate in, or assert, the right to strike against the government under pain of criminal sanctions, as well as removal. *See* 18 U.S.C. § 1918; 5 U.S.C. § 7301. Their political activities have long been restricted in order "to serve this great end of Government—the impartial execution of the laws" and to conform their official conduct with "the will of Congress, rather than in accordance with their own or the will of a political party." *United States Civil Service Commission v. National Association of Letter Carriers*, 413 U.S. 548, 565 (1973). *See also* 5 U.S.C. § 7321 *et seq.*

Restrictions on *post*-employment conduct equally demonstrate the level of fidelity expected of government employees. *See e.g.* 18 U.S.C. § 207. The essence of these restrictions is to prevent individuals from using their official positions for personal profit, or having their public duties compromised by the promise of financial gain.

Unlike the government, business is not constrained by these restrictions which are designed to ensure integrity of public employees entrusted with the public interest. On the contrary, such an enterprise is, by definition, ordered precisely for "the profit, honor, or private interest of any one person, family, or class of persons." Officers and directors of a corporate contractor have a fiduciary duty to act in the interest of the corporation. *See e.g., United States v. Bynum*, 408 U.S. 125, 137-138 (1972). This obligation is often viewed as encompassing a duty of loyalty to the corporation. *See e.g., Radol v. Thomas*, 772 F.2d 244, 256 (6th Cir. 1985) (applying substantive law of Ohio), *cert. denied* 477 U.S. 903 (1986). In fact, in some states, the duty imposed upon corporate officials is defined as one of "undivided loyalty" to the corporation. *See e.g., Seaboard Industries Inc. v. Monaco*, 442 Pa. 256, 262 (1971).

Because public service and private business are defined by fundamentally different purposes and duties, the mere performance of a governmental function does not transform the private contractor into a public servant for purposes of immunity. Nor do the Court's precedents, which recite the proposition that the conduct at issue is relevant to the immunity analysis,[6] require such a holding. On the contrary, all these cases deal with claims of immunity brought by governmental officials. That the actor claiming immunity must be, as a threshold matter, a governmental official implicitly, but necessarily, flows from the Court's repeated recognition that the purpose of qualified immunity is "to safeguard *government*." *See Wyatt v. Cole, supra*, 504 U.S. at 168 (emphasis added).

It is significant, therefore, that when presented with the opportunity in *Wyatt* to depart from this principle, and to extend qualified immunity to a private party, the Court declined to do so, even in the face of a strong countervailing argument that equitable considerations required the protection of private individuals who rely upon seemingly valid legal process, in the same way that government officials who enforce such process are protected. Thus, the Court of Appeals for the Sixth Circuit correctly read *Wyatt* as requiring not only an examination of the conduct at issue, but also in inquiry into whether extending immunity to private parties served the public interest. *See McKnight v. Rees*, 88 F.3d 417, 423 (6th Cir. 1996).

Moreover, it does not require special predictive powers to see that extending qualified immunity to anyone who ostensibly performs a governmental function will thrust courts into the morass of defining "governmental functions." For example, a judge performs judicial acts which render him or her immune from suit. But many actions

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[6] *See e.g. Forrester v. White*, 484 U.S. 219 (1988) (judge does not have absolute immunity from probation officer's suit alleging discriminatory discharge); *Harlow, supra*, 457 U.S. at 810-813; *but see Anderson v. Creighton*, 483 U.S. 632, 643 (1987) (FBI agent has qualified immunity from suit arising out of warrantless arrest) ("we have been unwilling to complicate qualified immunity analysis by making the scope or extent of immunity turn on the precise nature of various officials' duties or the precise character of the particular rights alleged to have been violated.")

and decisions taken by private individuals (employers readily come to mind) may be described as "judicial" insofar as they determine the rights and liabilities of other individuals. Yet no one would seriously contend that engaging in that function renders non-jurists immune from suit. Similarly, a private school teacher who inflicts corporal punishment is not rendered immune from suit for resulting injuries simply because he or she engages in a function which is also performed by a vast number of public employees. Likewise, there are a host of functions, such as postal delivery, which were once carried out by the government, but are increasingly within the purview of the business sector. Will businesses be immune from suit because they are engaging in a function that was at one time considered to be purely governmental?

The limiting principle implicit in petitioners' argument seems to be that they deserve immunity because they have contracted with the government. If so, then the crux of their position is that a party's status, i.e., as "contractor," entitles it to immunity. However, for all the reasons noted above, it is abundantly clear that a private contractor, even while performing a governmental function, does not stand in the stead of a public officer or employee.

II. EXTENSION OF QUALIFIED IMMUNITY TO PRIVATE CONTRACTORS WOULD UNDERMINE THE BALANCE BETWEEN PROTECTING THOSE INJURED BY UNCONSTITUTIONAL CONDUCT AND PROTECTING GOVERNMENT'S ABILITY TO PERFORM TRADITIONAL FUNCTIONS.

"Qualified immunity strikes a balance between compensating those who have been injured by official conduct and protecting government's ability to perform its traditional functions." *Wyatt v. Cole, supra*, 504 U.S. at 167; *see also Harlow, supra*, 457 U.S. at 813-814 ("Resolution of immunity questions inherently requires a balance between the evils inevitable in any available alternative.") Where, as here, an action for damages is the "only realistic avenue for vindication of constitutional guarantees," granting immunity heightens the risk of injury due to unconstitutional conduct. *See Harlow, supra*, 457 U.S. at 814. This heightened risk is not offset by any discernible benefit to the government in extending immunity to its contractors.

The limited accountability incident to privately maintained prisons increases the probability of unconstitutional conduct. A prison, even one run by government officials, is an environment "where the door is closed, not open, and where there is little, if any protection by way of community observation." *Cleavinger v. Saxner*, 474 U.S. 192, 205 (1985). A privately run facility poses an even greater threat of unconstitutional conduct because it lacks certain safeguards, present in a publicly run prison, which assure a significant degree of public accountability.

For example, publicly employed guards and other prison personnel are protected in a variety of ways from retaliation for exposing abuses. Prison guards employed by the federal Bureau of Prisons, for instance, cannot be terminated from employment without cause. *See* 5 U.S.C. § 7513. Moreover, the Whistleblower Protection Act, Pub. L. No. 101-12, 103 Stat. 16 (1989), affords them a significant degree of protection from retaliatory actions should they attempt to disclose unlawful conditions or conduct by other government officials. Such protections exist for a vast number of federal and state employees.

Conversely, the overwhelming number of non-public employees are employed "at-will." *See Buethe v. Britt Airlines*, 787 F.2d 1194, 1197 (7th Cir. 1986). This means that an employer may fire an employee "for good reasons, bad reasons, or no reasons, without incurring liability." *Id.* In *Buethe*, for example, the plaintiff, a pilot, brought a wrongful discharge action alleging that he was fired for refusing to fly an unsafe plane. Although the plane was apparently defective, the court of appeals affirmed the dismissal on the grounds that Indiana's tort of

wrongful termination law did not extend to whistleblowing. *Id.* Facing termination for exposing unlawful treatment of prison inmates poses a clear disincentive for employees to assume the responsibility for ensuring the constitutionality of the contractor's performance.

The threat of unconstitutional conduct is further exacerbated in the privately run prison by the inapplicability of certain public access laws to private enterprises. For example, in the federal sector, the Freedom of Information Act, 5 U.S.C. § 552, represents a statutory mandate for a level of public access and scrutiny unparalleled in the private sector.

Conversely, any benefit derived from granting immunity to these privately employed prison guards will clearly inure to the financial benefit of their employer, a for-profit corporation, not to the government. Immunity under these circumstances serves none of the governmental interests previously identified by the Court. For instance, suits against a government contractor will not expose the government to litigation expenses, or divert "official energy from pressing public issues," or "deter able citizens from accepting public office." *See Harlow v. Fitzgerald, supra,* 457 U.S. at 814.

Assuming *arguendo* that the government's interest in the "unflinching discharge" of public duties can be extended to government contractors, AFGE asserts that the threat of a lawsuit is less likely to influence the conduct of the employees of corporate giants such as the Corrections Corporation of America, than that of a lone public employee. Moreover, if the contractor does pass the cost on to the government, as suggested, then the threat of a lawsuit will have virtually no impact on its willingness to fulfill its contractual obligations with the requisite vigor.[7]

[7] This Court has recognized that Congress is in the best position to make such policy determinations in the area of immunity. *See e.g., Westfall v. Erwin,* 484 U.S. 292, 300 (1988). Yet, Congress has not extended governmental immunity to federal contractors, which strongly suggests that it does not believe the federal government to be hampered in its contracting out efforts by the prospect of contractor liability for unconstitutional conduct.

In sum, granting qualified immunity to petitioners would increase the risk of unconstitutional conduct, without obtaining any additional assurance that the government's interests would be served. Under these circumstances, the balance weighs heavily in preserving what may be the only realistic mechanism for deterring unconstitutional conduct by private prison guards.

CONCLUSION

Based upon the foregoing reasons, Amicus American Federation of Government Employees, AFL-CIO, respectfully requests that the Court affirm the decision of the United States Court of Appeals for the Sixth Circuit.

Respectfully submitted,

MARK D. ROTH
ANNE M. WAGNER *
AMERICAN FEDERATION OF
GOVERNMENT EMPLOYEES,
AFL-CIO
80 F Street, N.W.
Washington, D.C. 20001
(202) 639-6425
Counsel for *Amicus Curiae*

* Counsel of Record

February 12, 1997